SUPREME COURT, U. S.

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In the Supreme Court of the United States

October Term, 1964

No. 738

CASCADE COUNTY CONSUMERS ASSOCIATION;
MONTANA CONSUMER ASSOCIATION;
MONTANA STATE FLORISTS ASSOCIATION;
RALPH PARKER, an individual;
ARTHUR SMITH an individual; and
LLOYD C. WENNER, an individual,

Petitioners,

—vs.—

PUBLIC SERVICE COMMISSION OF MONTANA
PAUL T. SMITH, JACK HOLMES and LOUIS G.
BOEDECKER, as members thereof and constituting
said Public Service Commission of Montana; and
THE MONTANA POWER COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To The Supreme Court of The State of Montana

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THE MONTANA POWER COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To The Supreme Court of The State of Montana

To the Honorable Chief Justice and to the Associate Justice of the Supreme Court of the United States:

Cascade County Consumers Association, et al, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Montana entered in the above-entitled case on August 19, 1964, reversing the decision and judgment of the District Court of the Eighth Judi-

cial District of the State of Montana, in and for the County of Cascade, entered on the 3rd day of June, 1963.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Montana is printed in Appendix I hereto at pages 21 to 68, and appears in Volume 394 of Pacific 2nd Reporter, at page 856. The opinion of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade is unreported. It is printed in Appendix III hereto at pages 71 to 112. The District Court's Findings of Fact and Conclusions of Law and Judgment are printed in Appendix IV hereto at pages 113 to 122. The Order of the Montana Public Service Commission is unreported and appears in the Transcript filed with this petition. (Transcript Appendix A).

JURISDICTION

The opinion of the Supreme Court of the State of Montana was rendered August 19, 1964 (Appendix I page 22). The petition for re-hearing, timely filed, was denied September 9, 1964 (Appendix II page 69).

The jurisdiction of this Court is invoked by 28 U.S.C., Section 1257, sub-division 3.

QUESTIONS PRESENTED

This case arises out of an administrative proceeding to set natural gas rates for the State of Montana. After an extensive public hearing but before the

decision was rendered, the Montana Public Service Commission held a private and secret meeting with counsel for the applicant Montana Power Company and certain of its witnesses. It later developed that the Commission also conducted certain investigations and gathered information after closing the public hearing. The results of the investigation and the information gathered was not made public nor placed of record. Protestants to the proposed increase in gas rates were not afforded an opportunity to know the information or to cross examine or rebut.

From the Commission's opinion it appears that property not "used and useful" to the Utility, as tested by accepted accounting practice, was allowed as part of the rate base.

The questions presented are:

(1) Is a secret meeting before a State Regulatory Commission, attended by counsel and witnesses for only one side, and held after the closing of a controverted public hearing and before the Commission's Order issued, a violation of due process?

(2) Is it a violation of due process for a State Regulatory Commission to collect information outside the record after the close of a controverted public hearing on a rate application, and use such information in the decision process without spreading it upon the record and allowing opportunity to the protestants to know of, controvert or otherwise oppose the information?

(3) Are consumers deprived of their property with-

out due process when a State Regulatory Commission includes property (oil and gas leases) not used and useful, in the rate base from which utility rates are computed?

STATUTES INVOLVED

The due process clause of the 14th Amendment of the United States Constitution is involved as it applies to the actions and holdings of a State Regulatory Commission:

> "AMENDMENT 14, (1) "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 3.7 of the Montana Public Service Commission's Rules of Practice is involved, for it purports to authorize such investigations after hearing and was cited by the Montana Supreme Court:

> "3.7: The Board reserves the right to conduct any independent investigation either before or after hearing to the end that it may be fully informed." (Appendix I p. 53).

STATEMENT

On October 14, 1961, the Montana Power Company, an electric and gas public utility, petitioned the Montana Public Service Commission for an increase in

its natural gas rates to consumers in Montana. Public hearings were had before the Commission, the utility's case being presented on May 23, 1961, and cross examination and rebuttal being presented from July 18, 1961, to August 2, 1961, when the public hearing was officially closed. The transcript before the Public Service Commission consisted of 31 volumes comprising 2,928 pages.

Thereafter, on October 4, 1961, a secret meeting was held at the Commission offices attended by counsel and witnesses for the utility but by no one representing the protestants before the Commission. The protestants learned, however, of the secret meeting and on October 27, 1961, filed a motion to re-open the case to consider further such matters as may have been discussed at the secret meeting. This motion was dismissed by the Commission when it issued its Order number 2897 (Transcript Appendix A, p. 17).

The Commission issued its basic Order number 2897 on February 2, 1962. Petitioners filed a timely appeal to the District Court (Transcript p. 1). After issue was joined a pre-trial conference was held and a Pre-Trial Order was prepared and issued by the Court (Appendix VI, p. 131). The District Court held hearings on August 15, 1962 and September 5, 1962. The District Court's Order setting aside and reversing the Commission's Order was issued on April 26, 1963 (Transcript p. 56). Thereafter, on June 3, 1963, the District Court issued Findings of

Fact, Conclusions of Law and Judgment (Appendix IV, p. 113).

On the same day that the District Court issued its Judgment, both the Montana Power Company and the Montana Public Service Commission appealed to the Montana Supreme Court (Transcript pp. 437, 438). The Montana Supreme Court issued its decision reversing the District Court on August 19, 1964, and denied a petition for re-hearing on September 9, 1964 (Appendix II, p. 69).

All the constitutional issues were raised and considered in both the District Court and the Montana Supreme Court, as more fully appears hereafter.

The issue of the secret hearing was first raised by the protestants' motion to re-open the hearing before the Public Service Commission, filed on October 27, 1961, after protestants learned such a meeting had been held (Appendix V, p. 123). The motion was based on affidavits of counsel and specifically requested that protestants be afforded the right of cross examination and rebuttal. The secret hearing was held because "There was a question that I wanted clarified and I discussed it with the other Commissioners and felt that we should have more information on it," according to Commissioner Smith in later testimony before the District Court. (Transcript p. 103). No record was made of the proceedings at the secret hearing. The secret hearing issue was raised in protestants' Complaint before the District Court, particularly by paragraph XIII:

"XIII. That the Order is unlawful in that it was based upon evidence supplied to, and given the Commission which is not contained in the record, some of which was obtained at a meeting held by the defendant Commission on October 4, 1961, to which representatives and witnesses of Montana Power were invited but from which all protestants, and plaintiffs herein, were excluded, which evidence, upon information and belief, concerned tax matters relative to the Canadian income tax upon the Canadian portion of the system and the United States income tax on the United States portion of the system, which evidence the defendant Commission refused to let the plaintiffs develop during the hearings; that the said defendant Commission was without authority to hear Montana Power witnesses privately on issues germane to the case and that the gathering of such evidence without the right of cross-examination in plaintiff protestants was unlawful and denied them a full and fair hearing; that timely request to reopen the hearing before the defendant Commission was made but that the said Commission denied such request."

In the Pre-Trial Order it was Issue of Fact No. 1 and Issue of Law No. 1 (Appendix VI, p. 131). The matter was briefed in terms of the due process clause and Justice Cardozo's opinion in **Ohio Bell Telephone Company v. Public Utilities Commission of Ohio** (1937) 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093, was cited to the Court and was quoted extensively by the District Court as the basis for its decision Transcript p. 85). This issue was the subject of the District Court's Findings of Fact No. 7 and No. 9, and its Conclusions of Law No. 2 and No. 3 (Ap-

pendix IV, p. 115, 118), where the District Court specifically held that the dismissal of protestants' motion to reopen the hearing was a denial of due process under the 14th Amendment. The **Ohio Bell case** was also cited to the Montana Supreme Court and the issue was directly passed upon there when that Court held that presenting the witnesses who appeared at the secret hearing before the District Court afforded the protestants due process of law.

> "With this testimony concerning the **October** 4 meeting, particularly the detailed statement by Mr. Harrington, the burden shifted to respondents to show damage to them resulting from the meeting. Having failed to do so, we cannot agree with the respondents' contention that the very denial of their right to cross examine immediately after the October 4 meeting denied them due process in view of the record made here."
>
> (Appendix I, p. 47)

The issue arising from the action of the Commission in collecting information dehors the record after closing the hearing first became apparent when the extent to which the Commission had gone outside the record was discussed by Commissioner Boedecker before the District Court (Transcript p. 146):

> A. "We had to consider the evidence that was in the record and then we had to determine—had various schedules drawn up which considered the amount of gas that was available, the field price of the gas, there was certain information that Mr. Johnson obtained from the Federal Power Commission in relation to that. We had to consider recoverable and non-recoverable gas and various schedules were

drawn up considering all these factors and final evaulation was made of the gas reserves.

Q. "Where did you get the field price?

A. "Mr. Johnson obtained those.

Q. "All that information was given to the Commission before they made this determination, is that correct?

A. "That is correct."

Mr. Boedecker testified that "the independent audit" made by the Commission's employees was never put of record in the case (Transcript p. 142). This issue was briefed to the District Court and was a main subject of the District Court's Order as appears from the Court's summary of the issues appearing in Appendix III at page 80.

The District Court's Findings of Fact No. 10 and No. 13 concerned this issue and its Conclusions of Law No. 5, No. 7 and No. 8 also concerned it (Appendix IV, p. 117, 119. The 14th Amendment was cited by the District Court in justifying its opinion. The matter was briefed to and considered by the Montana Supreme Court which specifically held that the 14th Amendment was not violated by the collection of information dehors the record:

"With the District Court's conclusion of law and findings of fact that the respondents were denied a full and fair hearing, and that the due process clauses of our State and Federal Constitution were violated because of the post-hearing audit made by two employees of the Commission, we do not agree:"

(Appendix I, p. 50)

See the Montana Supreme Court's Opinion at page 50 for their list of reasons.

The issue concerning inclusion in the rate base of property not used and useful was basic to the hearing on the merits before the Commission. Protestants presented Exhibit 40, which was a list of oil and gas leases on which no royalty was being paid and which would not be includible in the rate base under the Uniform System of Accounts. Although the Montana Public Service Commission has adopted the Uniform System of Accounts, the Commission ignored it in establishing the rate base. In its Order the Commission said:

> "The protestants argued that under the uniform system of accounts that leases upon which royalties were not being paid should be included in the account property held for future use. Accounting-wise this is undoubtedly correct. However, whether it is in the best interest of the Company and the rate payers to include this account, or part of this account, in the rate base is a matter for the judgment of the Commission."
>
> (Transcript Appendix A, p. 18)

In arriving at a rate base the Commission made an independent investigation of the leases, and without disclosing the results of this investigation, arrived at a rate base which cannot be computed from any figures in the record. This issue was raised in the Complaint before the District Court, specifically in paragraphs XVI and XVII:

> "XVI. That said Order No. 2897 authorized and allowed the defendant Montana Power to use in

calculating its rate base certain contended gas reserves, if existing at all, consists of natural gas in place under grounds in and to which Montana Power has no property interest other than as a Lessee under an Oil and Gas Lease. That in said Order of value for such gas reserves were allowed in the rate base when in truth and in fact such gas reserves, if existing at all, were not property of the Montana Power, as required in Section 70-106 Revised Codes of Montana, 1947, and at most are purely speculative possibilities; and further, that said Leases are subject to forfeitures and cancellation and the Order on its face shows that certain of the Leases considered at the hearing of this matter before defendant Commission were relinquished by The Montana Power between the date of the hearing and the date of the original Order in said Docket; and as a result of including such contended gas reserves, the said Order is both unreasonable and unlawful in that property other than property of the Montana Power is valued in the rate base and as a further result customers for gas from the Montana Power are paying rates based on property in excess of the property actually owned by the Montana Power; and the action of the Commission in allowing any value for such reserves is a violation of due process in that it allowed the Montana Power by rates based thereon to take the property of the consumer without consideration or giving value received for such rate payments.

"XVII. That Order No. 2897 authorized and allowed the defendant Company to use in its rate base lands not used and useful, namely leases upon which no royalty was being paid, and upon which there was no production; that these properties were allowed in the rate base contrary to the provisions of Section 70-106, R.C.M. 1947 and of the Uniform System of Accounts by which the Montana Power must

keep its books; that the Order admits on its face, on page 18 thereof, that such lands have been allowed in the rate base contrary to the Uniform System of Accounts, and that the plaintiffs and the users herein are being required to pay a rate of return of 5.89% on these lands (leases) not used and useful, and as such, the Order is both unreasonable and unlawful; that the action of the defendant Commission in allowing in the rate base leases on which no royalty is paid and which are held for future use violates due process of law and results in rates for plaintiffs herein and other customers which are unreasonable and unjust, and which take their property in the form of rate payments without due process of law.

In the Pre-Trial Order the issue was contained in Issue of Fact No. 3 and Issue of Law No. 4 (Appendix, VI, p. 131, 132). It was one of the major subjects discussed by the District Court in its Order and was involved in its Findings of Fact No. 11 and No. 13 and its Conclusions of Law No. 5 and 6. (Appendix IV, p. 117, 119). This issue was the subject of much of the Supreme Court's opinion, although the author of the opinion dissents from this portion of the opinion:

"The Commission's decision finds support in the evidence and thus the district court was in error in setting it aside.

"The writer of this opinion respectfully dissents to the latter conclusion of a majority of this court that the Commission decision finds support in the evidence insofar as the value of gas leaseholds included in the rate base are concerned. The evidence produced by the appellants concerning the gas reserves is not limited to the specific reserves owned

by the appellant Company or being presently utilized by appellant." (Appendix p. 65).

This issue concerning what is used and useful is interwoven with the prior issue because the Commission depends on information gathered outside the record in establishing the rate base.

REASONS FOR GRANTING THE WRIT

This Writ should be granted because the issues raised involve important federal questions, namely whether due process of law has been denied Petitioners (and all Montana rate payers) by the secret hearing, by gathering information dehors the record, and by applying property not used and useful to the rate base. These federal questions have been decided by the Montana Supreme Court in a way not in accord with applicable decisions of the United States Supreme Court.

The Montana Supreme Court by its decision rendered in this case violated the 14th Amendment to the Constitution as construed by Judge Cardozo in **Ohio Bell Telephone Co. vs. Public Utilities Commission of Ohio** (1937) supra, when it held that a state regulatory body may hold secret meetings after the closing of a public hearing and that a state regulatory body may collect information dehors the record after closing the public hearing and without spreading such information upon the record and giving protestants opportunity to controvert it. Justice Cardozo's opinion, which was cited to the Montana Supreme Court, holds:

"What was done by the Commission is subject, however, to an objection even deeper. Cf. Brown v. New Jersey, 175 U.S. 172, 174, 175, 44 L ed. 119-121, 20 S. Ct. 77; West v. Louisiana, 194 U.S. 258, 262, 263, 48 L ed. 965, 969, 970, 24 S. Ct. 650. There has been more than an expansion of the concept of notoriety beyond reasonable limits. **From the standpoint of due process—the protection of the individual against arbitrary action—deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown: there is no way to find them out.** When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copies in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. **The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists,** as if a judge were to tell us, 'I looked at the statistics in the Library of Congress and they teach me thus and so.' **This will never do if hearings and appeals are to be more than empty forms.*****

"To put the problem more concretely: **How was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that is approved was unknown and unknowable?** In expressing that approval the court did not mean that, traveling beyond the record, it had consulted price lists for itself and had reached its own conclusion as to the

percentage of decline in value from 1925 onwards. It did not even mean that it had looked at the particular lists made use of by the Commission, for no one knows what they were in any precise or certain way. Nowhere in the opinion is there even the hint of such a search. What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation and let it go at that. **A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.'** West Ohio Gas Co. v. Public Utilities Commission (No. 1) supra (294 U.S. p. 69, 79 L ed. 768, 55 S. Ct. 316). Cf. Interstate Commerce Commission v. Louisville & N.R. Co. 227 U.S. 88, 91, 57 L ed. 431, 33 S.Ct. 185; United States v. Abilene & S.R. Co. 265 U.S. 274, 288, 68 L. ed. 1016, 1022, 44 S.Ct. 565; Chicago Junction Case (Baltimore & O. R. Co. v. United States), 264 U.S. 258, 263-265, 68 L ed. 667, 673, 674, 44 S. Ct. 317.

"Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. West Ohio Gas Co v. Public Utilities Commission (No. 1) supra (294 U.S. p. 70. 79 L ed. 768, 55 S. Ct. 316; West Ohio Gas Co. v. Public Utilities Commission (No. 2), 294 U.S. 79, 79 L ed. 773, 55 C. Ct. 324; Los Angeles Gas & E. Corp. v. Railroad Commission, 289 U.S. 287, 304, 77 L. ed. 1180, 1191, 53 S. Ct. 637. **Indeed, much that they do within the realm of administrative discertion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard'** (St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 73, 80 L ed. 1033, 1052, 56 S. Ct. 720) **of a fair and**

open hearing be maintained in its integrity. Morgan v. United States, 298 U.S. 468, 480, 481, 80 L. ed. 1288, 1294, 1295, 56 S. Ct. 906; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U.S. 88, 57 L ed. 431, 33 St. Ct. 185 supra. **The right to such a hearing is one of 'The rudiments of fair play'** (Chicago, M. & St. P. R. Co. v. Polt, 232 U.S. 165, 168, 58 L ed. 554, 555, 34 S. Ct. 301) **assured to every litigant by the Fourteenth Amendment as a minimal requirement.** West Ohio Gas Co. v. Public Utilities Commission (No. 1), (No. 2), 294 U.S. 63, 79, 70 L ed. 761, 773, 55 S. Ct. 316, 324, supra; Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 682, 74 L ed. 1107, 1114, 50 S. Ct. 451. Cf. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 77 L ed. 796, 53 S. Ct. 350 supra. **There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."** (Emphasis supplied).

The Montana Supreme Court argues that when the witnesses who were at the secret hearing appeared before the District Court, some ten months later and after the Commission issued its Order, this amounted to due process. Petitioners argue that this procedure, with no record to work from, after the decision-making process of the Commission is complete, and when time alone would dull the witnesses' memory of what facts they may have imparted to the Commission at the secret hearing, is not due process. Cross examination and rebuttal without knowledge of what actually took place at the secret meeting we believe is futile. This is the substance of this issue.

The Montana Supreme Court also argues that "the burden shifted" when the Company witnesses and Commission investigators were made available at the District Court hearing. Petitioners feel that since the information collected dehors the record was never put into the record before the Commission Order was issued, that the Utility never sustained its original burden. The Commission admits it investigated outside the record to obtain information on which it based its Order. (Transcript Appendix A. pp. 17, 22, 27). Petitioners do not contest the Commission's right to do so. But they contend that if the Commission does so, it must then spread this information on the Record and let the protestants cross examine and rebut, before making its decision. This was never done. Offering up these witnesses ten months later, after the new rates are in effect, seems to protestants to be less than a fair hearing and to lack due process.

On these issues see also the annotation in 18 ALR 2d page 552.

On the issue of including property not used and useful in the rate base the Montana Supreme Court also violated the 14th Amendment by approving the decision of the Montana Public Service Commission. The judgment of the Court and the Commission is at odds with the opinion of Justice Cardozo delivered in **Columbia Gas & Fuel Co. v. Public Utilities Com.**, 292 U.S. 398, 78 L. Ed. 1327, 54 S. Ct. 763, 91 ALR 1403, at page 1408:

"There will be no need in the computation of the rate base to include the market or the book value of fields not presently in use, unless the time for using them is so near that they may be said, at least by analogy, to have the quality of working capital. The arrival of that time cannot be known in advance through the applicaion of a formula, but within the margin of a fair discretion must be determined for every producer by the triers of the facts in the light of all the circumstances. The burden is on the gas company to supply whatever testimony may be necessary to enable court or board to make the requisite division. Leases bought with income, the proceeds of the sale of gas, and thus paid for in last analysis through the contributions of consumers, ought not in fairness to be capitalized until present or imminent need for use as sources of supply shall have brought them into the base upon which profits must be earned. To capitalize them sooner is to build the rate structure of the business upon assets held in idleness to abide the uses of the future . . . ."

In our case the problem is compounded because the Commission went outside the record to establish which leases to include and so no one but the Commissioners (and their investigators) even know which leases are in and which are out.

"The Commission has made a detailed study of the leases in question and finds that most of them are leases adjacent to producing leases. It appears to this Commission that it is only good business acumen for the Company to obtain leases protecting leases already held by the Company. . . ."

(Transcript Appendix A p. 22)

See also the District Court's discussion of **City of Erie v. Public Service Commission,** Penn. 1924, 123 Atl. 47, in Appendix III at page 97.

When Judge John Harrison, the author of the Montana Supreme Court decision, "dissented" from his own opinion on this point he really admits that this is a 3-2 decision before that body. He dissents because he questions the value assigned to leases in the rate base. This value was arrived at outside the record evidence and so he really agrees with Petitioners on that issue too. The District Court held in Finding of Fact No. 11 that the value of gas reserves has a substantial effect on the rate base (Appendix IV, p. 117). The District Court commented on this compound question as follows:

> ". . . . It is further apparent that the commission's order rejected this method of valuation; from Mr. Boedecker's testimony, it is apparent that the commission in arriving at their RCND figure for gas reserves of necessity made an independent investigation of value which is not in the original transcript or in the Court record and is not available to this Court or any other Court in determining evidence upon which the rate can be based."
>
> (Appendix III, p. 96)

And so Petitioners think due process requires that the Commission show what it did in its investigation and how it arrived at the value of leases. Then only property **presently** used and useful should be included in the rate base.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Write of Certiorari should be granted.

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APPENDIX I

MONTANA SUPREME COURT OPINION

No. 10610

STATE OF MONTANA

In the Supreme Court, June, 1964

CASCADE COUNTY CONSUMERS ASSOCIATION;
MONTANA CONSUMERS ASSOCIATION;
MONTANA STATE FLORISTS ASSOCIATION;
RALPH PARKER, an Individual;
ARTHUR SMITH, an Individual; and
LLOYD C. WENNER, an Individual,

Plaintiffs and Respondents,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA, PAUL T. SMITH, JACK HOLMES and LOUIS C. BOEDECKER, as members thereof and constituting said PUBLIC SERVICE COMMISSION OF MONTANA; and THE MONTANA POWER COMPANY, a Corporation,

Defendants and Appellants.

Appeal from:

District Court of the Eighth Judicial District, Honorable Paul G. Hatfield, Judge Presiding.

Counsel of Record:

For Appellants:

William P. Mufich; Helena Montana.
Sam B. Chase, J. J. Burke, Jr., Robert D. Corette, William H. Coldiron; Butte, Montana.
John H. Weaver; Great Falls, Montana

William P. Mufich, Sam B. Chase and Robert D. Corette argued orally.

John H. Weaver, William H. Coldiron and J. J. Burke, appeared.

For Respondents:

Leo C. Graybill, Jr. and
P. J. Gilfeather; Great Falls, Montana.
C. W. Leaphart; Helena, Montana.
Leo C. Graybill, Jr., P. J. Gilfeather and
C. W. Leaphart argued orally.

Submitted: December 10, 1963
Decided: August 19, 1964
FILED: August 19, 1964

THOMAS J. KEARNEY, Clerk

Mr. Justice John C. Harrison delivered the Opinion of the Court.

This is an appeal by the defendants and appellants, the Public Service Commission of Montana, and The Montana Power Company, from a judgment of the district court of the eighth judicial district, the Honorable Paul G. Hatfield, Judge presiding, which set aside and reversed an order of the appellant Commission as being unlawful and not based on sufficient evidence.

In April 1961, the appellant Montana Power Company filed a petition with the Montana Public Service Commission for authority to increase rates and charges, with a price adjustment clause, for natural gas service within the State of Montana. The petition alleged the following:

(1) Petitioner had been a distributor of natural gas in Montana since 1931;

(2) That only one increase had been granted petitioner since 1931, and that was in 1953;

(3) That in 1954 petitioner had acquired the natural gas system of The Montana-Dakota Utilities Company in the Hi-Line area of Montana;

(4) That present rates and charges are insufficient to produce a fair, reasonable and proper return to the Company because of wage increases and benefits, increased costs of materials and supplies and equipment of all kinds, and increased taxes;

(5) Petitioner further alleges that due to the continuing and increasing demand for natural gas that large expenditures are required for replacements, property and improvements, also that additional gas reserves are required to supply present and future customers, and that in order to assure an adequate supply the Company was required to and did obtain additional reserves from the Province of Alberta;

(6) That the obligations and expense imposed on the Company for said additional natural gas will sharply increase the Company's cost of doing business in Montana;

(7) The petition further requests the Commission to approve new rates for natural gas service to the Great Falls Gas Company for an interim period to January 1, 1967; and

(8) The petition requested a uniform rate for its entire system, declaring that a zoned rate was undesirable, however, it asked for special industrial and city gas rates for some large users.

To this petition of the appellant Company, a multitude of protests were filed. Included were the re-

spondents in this action. One month after appellant filed its petition the Commission set the first of the two hearings. The first hearing was held in Helena, Montana, on May 23, 24, 1961, for the purpose of allowing appellant Montana Power Company to present its case in chief. On July 18, 1961, the hearing was reconvened in Butte, Montana, for the purpose of cross-examination of appellant Company's witnesses and for the presentation of protestants' evidence and for Montana Power's rebuttal. This portion of the hearing took from July 18 to August 2, 1961, and the major portion of the 2,900 pages of testimony were produced during this period.

The entire fiscal, production, transmission and policy operations were explored by all interested parties at the Board hearings.

It was contended by the appellant Company that in conformity with the generally agreed policy throughout the country that a fair rate of return is in the neighborhood of six percent. The applicant Commission agreed that six percent was what they strived for in their order. The testimony produced by the expert fiscal witness, Mr. Woy, was to the effect that in 1960 they earned a return in the gas portion of the business of 3.54 percent figured on the reproduction cost less depreciation of 3.54 percent figured on the reproduction cost less depreciation theory of figuring rates; 5.28 percent on the original cost theory; 7.30 percent on original cost less depreciation; but only 4.49 percent on his estimate of the

fair value of the system; and that if the Commission would grant the increase, in 1962 they would earn 6.07 percent.

W. C. Gilman, a fiscal expert employed by The Montana Power Company, testified that a fair rate of return for Montana Power gas properties should be 6.75 percent.

Dr. L. S. Knappen, the fiscal expert of protestants, in his testimony criticized the 6.75 percent figure of Mr. Gilman, pointing out that it was based on 161.07 percent of book value of the common stock and would amount to a 20.79 percent of its 1960 book value, or 20.28 percent of its 1962 book value. He stated that based on Mr. Woy's figures, The Montana Power Company was earning more than 6 percent on every one of the functions, as set forth separately, i.e., production, transmission, and distribution.

Mr. John W. Kushing, the fiscal expert of the Commission, testified that he recommended 5.96 percent as a reasonable return on fair value.

Throughout the testimony some difficulty was evidenced in separating the multiple functions of the Company which break down basically to 67 percent electrical and 33 percent gas. In this respect The Montana Power Company is unique among privately owned public utilities. Both the Commission and the District Court seem to have had difficulty in properly separating the figures given and relating them to the gas rate only. Evidence of rates of return on the whole Company's gas and electricity ran from 8.3

percent up to 9.3 percent making this private utility company one of the high income utilities.

Evidence given showed that the value of the stock in The Montana Power Company increased five times in the years 1950-60.

Testimony revealed that well over $100,000 is spent yearly in advertising, raising a question of how much spent in this field by a company, with a franchise that serviced two-thirds of the State of Montana, is reasonable and beneficial to the rate payer. However, the amount did not shock the conscience of the Commission so neither the District Court nor this court has the matter on appeal.

Montana Power Company spends about 7.00 percent of their money on interest.

Prior to getting Canadian gas, the Company paid independent Montana producers 5.7 cents per cubit foot or less as against about 24 cents for the Canadian gas although the Company did say recently it had increased its offer for Montana gas.

Testimony given by the Company, and approved by the Commission, provided for a uniform rate for the entire system, as against a zone rate.

Concerning taxes paid by the Company it was shown that of the increase requested that some 54 percent of the additional revenue collected would be paid by The Montana Power Company into federal, state and local treasuries.

Certain facts concerning the gas supply and reserves were testified to during these hearings, that

are of importance to this case in view of the allegations made by the protestants at the Board meeting and denials by the petitioners (now appellants) as to the necessity of The Montana Power Company's securing Canadian gas.

The protestants infer that Montana, particularly the area north and northwest of Great Falls, is a great undeveloped gas area and that if The Montana Power Company would pay enough for the gas when found in sufficient quantities to make it profitable, reserves would be found. The Company denied that the price paid by them is the limiting factor, but alleges that discoveries of the quality of gas found in Canada just have not happened in Montana in spite of considerable exploration both by Montana Power and other interested groups.

Further, that in Montana over a period of nine years, 1951-60, the records show that 11.5 dry holes occur for every producer, while in contrast Alberta has one producer for each 3.6 holes drilled, North Dakota, one producer for each 7.7 holes drilled and Wyoming 1 to 7. Too, the Company alleges that, with an increase in consumption during the past ten years, they were running short of reserves and that it was absolutely necessary to get into Canada when they did in order to secure adequate reserves.

The Board hearing revealed that in 1954 the Company purchased from the Montana-Dakota Utilities all of its properties north of Great Falls and as far east as Fort Belknap. This purchase included the

contract to serve the Great Falls Gas Company.

In addition to the northern area, testimony revealed three other sources of supply and reserve servicing the Company; purchase from the Montana - Dakota Utilities in south central Montana of gas from Wyoming, the Dry Creek field in Montana, and the unconnected part of the system serviced by the Big Coulee field built in 1955 to service central Montana.

Prior to 1950, The Montana Power operated exclusively in the United States, but in that year they went into Alberta for the purpose of developing additional gas in the Pakowki Lake area just north of Montana. The Company contends that even with the Pakowki Lake Reserves they would have been unable to supply the annual requirements of customers beginning in 1963.

The Company testified that as a result of their going into Canada early, and being the first to import gas out of Canada, that they were allowed to join with The Pacific Gas and Electric Company in 1959 to import some thirty million feet of gas per day which amounts to 10,920,000,000 cubic feet per year at a price of 24 cents per thousand cubic feet or at a cost of $209,000 per month maximum, or if taken at 90 percent load factor in the amount of $188,000 per month. The Company alleges that in such amounts they have secured an adequate reserve for Montana's immediate needs. The Canadian gas is purchased from The Alberta-Southern Gas Company which pays the Alberta producer and the transporta-

tion costs of said gas to a point some four miles north of the United States border. There it is delivered to the Canadian-Montana Pipe Line Company, an exporting company, which transports the gas four miles to The Montana Power Company line at the border. The Canadian-Montana Pipe Line Company is paid a transportation cost for the four mile trip and is a wholly owned subsidiary of Montana Power Company. In order to get this gas from the border into its system, the Company had to build some 56 miles of 16 inch pipe from the border to Cut Bank at a cost of $2,565,914.

In addition to testimony on the Canadian gas purchases the appellant Company testified on additional costs made necessary due to their storage projects. The Canadian contract, calling for a 90 percent load factor, necessitated additional storage because the Company had to take at least 90 percent of the daily contract. So one new storage area was added in the Deer Lodge Valley to the other storage areas in Madison County, Shelby, Cut Bank and Box Elder.

The respondents contended at the Board hearings and on appeal to the district court that the Company failed either in its petition to allege or at the hearings to show:

(1) Sufficient evidence to show the actual amounts it spent for the periods testified to or for the test year, and that there was insufficient showing of original costs;

(2) No competent evidence from which the actual

value of Company's gas reserves could be determined, and that the methods used for determining gas reserves were reasonable and arbitrary;

(3) Property not actually used to serve customers was used to determine the rate base;

(4) Public Service Commission improperly used "cost of capital" basis for determining rates; and

(5) Improper meeting held between the appellants (Montana Power Company officials and commissioner's) on October 4.

At the close of the evidence, counsel for the respondents moved the Commission to:

(1) "Order an independent audit in accounting of the Company's books and records to reflect a new-reproduction-cost study"; and

(2) "For an accounting to establish an original cost basis; and that the whole problem of the (gas) leases • • • should be looked into • • • to determine what should be included in certain accounts;" and further stated "I think it is going to take an accounting to determine what should be in there, so I would like to make that as a further motion."

Such an independent audit and accounting was immediately made by employees of the Commission which took several weeks to complete.

On October 4, 1961, at Helena, officials and experts of The Montana Power Company, together with the Company counsel made an appearance before at least two members of the Commission. They were summoned by the Commission or a member or mem-

bers there-of to clarify certain matters having to do with the inter-relationship of the return on Montana production property and Canadian property and the effect upon income taxes resulting from this. Neither the respondents nor their counsel were notifed of this meeting, nor were any records kept as to what was said.

Upon learning of this October 4th meeting, the respondents on October 27, 1961, filed a petition to reopen the matter for further hearing. This petition was based on an affidavit alleging the meeting of October 4. The petition requested that the Commission suspend all further proceedings in the matter and that further hearing be held for the purpose of examining witnesses of The Montana Power Company and to allow the protestants to present additional evidence. A ruling on this motion was taken under advisement by the appellant Commission.

The Commission on February 2, 1962, issued its Order No. 2897 which fixed rates and charges for natural gas service by Montana Power. The appellant Commission dismissed the motion for further hearing made on October 27 and stated:

"The purpose of the informal meeting was a part of the Commission's independent investigation of matters on which the members of the Commission wanted to become more fully informed within the meaning of the statutes, supra."

The appellant Commission referred to R.C.M. 1947, § 70-104, as authority for the informal hearing. This

statute authorizes the Commission to adopt proper rules and regulations relative to audits, investigations and hearings. Rule 3.7 of the Commission reads:

"The Board (Commission) reserves the right to conduct any independent investigation either before or after hearing to the end that it may be fully informed."

On February 16, 1962, respondents and four other protestants filed with the Commission a Petition for Rehearing, to which The Montana Power Company filed objections. A week later the Commission on February 23 issued Order No. 2897-A which denied the Petition for Rehearing and "after re-considering all of the evidence introduced by all parties at the hearings held in this Docket and the briefs of the parties heretofore filed" reaffirmed Order No. 2897 "except the rate schedule for the Great Falls Gas Company" which it modified in certain particulars not involved in this appeal.

The respondents then, on April 27, 1962, filed a complaint in the district court below to set aside Order No. 2897 as unlawful, unreasonable, discriminatory and unjust. Both defendants filed answers and a certified copy of the Record of Proceedings held and testimony taken before the Commission was certified to the District Court. Following a pre-trial conference the lower court made a Pre-Trial order dated July 27, 1962.

Hearings commenced in the District Court before Judge Hatfield on August 15, 1962, and were con-

tinued to and concluded on September 5.

At the conclusion of the appeal before Judge Hatfield, the court ordered the testimony of the hearings had before the court transcribed and submitted to the appellant Commission, as required by section 70-128, subd. (3), R.C.M. 1947. The appellant Commission on October 10, 1962, in a Supplemental Order No. 2897-B ratified and affirmed its previous orders 2897 and 2897-A.

On April 26, 1963, Judge Hatfield, the presiding Judge made a lengthy order wherein he reviewed the facts and the law and set aside and reversed as being unlawful and not based on sufficient evidence the orders of the appellant Commission. On June 3, 1963, he signed his Findings of Facts and Conclusions of Law and on the same day signed a judgment against appellant Commission. Said judgment went to the appellant's Orders 2897 and 2897-A.

In addition to the hearing on the above two orders heard by Judge Hatfield, the appellant Commission heard testimony from which an action resulted in Blaine County entitled "McCartney, Johnson, Anderson, Vita Rich and Havre Laundry and Hi-Line Gas Consumers Assn. v. Public Service Commission, Cause No. 6143. Upon the disqualification of Judge Elwell in that matter, Judge Frank Haswell assumed jurisdiction. He heard the parties on September 20, 1962, having delayed a previous setting of the case on August 20, 1962, in order to have a transcript of the case heard in Cascade County by Judge Hat-

field. It was stipulated that Judge Haswell could examine the evidence presented before Judge Hatfield in considering this case. Judge Haswell found that the Cascade County case was different in certain respects to the one being heard by him in Blaine County. He therefore took additional testimony on the case and then transmitted his findings to the appellant Commission as provided by section 70-128, R.C.M. 1947. The appellant Commission after considering this evidence returned the case to Judge Haswell reaffirming the appellant Commission and The Montana Power Company.

It should be noted that Judges Hatfield and Haswell in their separate judgments made reference to the two cases: Judge Hatfield, in paragraph IV of the judgment, said:

"That this judgment and order shall apply to the rights of the parties to this action or this action itself as distinguished from the rights of the parties to cause No. 6143 in the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Blaine."

Judge Haswell found:

"That all the findings and orders of the Public Service Commission of the State of Montana contained in orders No. 2897 and 2897-A, Docket No. 4997, to the extent that all are applicable to the rights of the parties to this action itself, distinguished from the rights of the parties to cause No. 55117B in the District Court of the Eighth Judicial District Court

of the State of Montana, in and for the County of Cascade, are hereby affirmed."

The appellants, in a supplemental brief, contend that section 70-128, subd. (1), R.C.M. 1947, providing that an interested party dissatisfied with an order of the Commission "may within ninety days commence an action **in the district court of the proper county**" contemplates that an action appealing a Commission order can be brought in **but no county.** (Emphasis supplied.) Under this contention the case from Blaine County first secured jurisdiction over the appeal and the Cascade court had no jurisdiction to issue the judgment here appealed from. They cite as authority Colorado Interstate Gas Co. v. State Corporation Commission (Kan. 1964), 386 P. 2d 288; In re Woodside-Florence Irrigation Dist., 121 Mont. 346, 194 P. 2d 241; Larson v. Whitmer, 124 Mont. 399, 224 P. 2d 983; State ex rel. Stephens v. Keaster, 82 Mont. 126, 266 P. 387.

With this contention we hold brief. In the first place the argument is not timely due to the fact it was raised neither in the pleadings nor briefs of appellants. Secondly, neither the parties nor the facts are the same in the two cases, and no effort to consolidate the two cases was ever made. Third, our statute differs from that of the Kansas case relied upon.

From the findings of fact and conclusions of law and judgment the appellant set forth some sixteen specifications of error, which are as follows:

"1. The court below erred in entering judgment in

favor of Plaintiffs (Respondents) and against the Defendants (Appellants.)

"2. The court below erred in setting aside and reversing a[illegible]g unlawful and not based upon sufficient legal evidence Commission Order No. 2897 of Docket No. 4997, including further rates and charges set forth in Order No. 2897-A.

"3. The court below erred in declaring the rates and charges set forth in Order No. 2897, including further rates and charges set forth in Order No. 2897-A, to be unlawful, void and of no force and effect, and in vacating and setting aside said rates.

"4. The court below erred in failing to take into account the fact that rate-making proceedings are legislative, not judicial in character.

"5. The court below erred in failing to give proper weight to the statutory presumption that rates fixed by the Commission are prima facie lawful.

"6. The court below erred in finding that Plaintiffs were not given an opportunity to cross-examine or to argue or to introduce rebuttal evidence as to the meeting of October 4, 1961, and as to the investigation conducted by the Commission's staff.

"7. The court below erred in finding that the Commission, in valuing gas reserves, used outside information and evidence.

"8. The court below erred in finding that the Commission rejected the methods proposed by Montana Power for valuation of gas reserves and substituted a determination of value for gas reserves not sup-

ported by legal evidence in the record.

"9. The court below erred in finding that the only evidence of Reconstruction Cost New Less Depreciation valuation in the record was specifically rejected by the Commission as a basis of value.

"10. The court below erred in finding that the Commission's determination of which gas properties are used and useful was based on information obtained outside the record.

"11. The court below erred in holding that there was any denial of due process of law or any violation of the Constitution of the State of Montana or of the United States Constitution.

"12. The court below erred in stating in its Conclusion of Law No. 6 that there is no evidence in the record to substantiate the Reproduction Cost New Depreciated valuation placed by the Commission upon gas reserves and used in determining the rate base.

"13. The court below erred in assuming or inferring in its Conclusion of Law No. 5 that the Commission, in valuing gas reserves, used information and evidence obtained outside the record without a full and fair hearing and in assuming or inferring in its Conclusion of Law No. 7 that the Commission secured or gathered evidence outside the hearing without a full and fair hearing.

"14. The court below erred in stating in its Conclusion of Law No. 8 that Order No. 2897 is based on information and purported evidence obtained outside the record and without fair hearing procedures.

"15. The court below erred in stating in its Conclusion of Law No. 9 that Order No. 2897 is based on insufficient legal evidence.

"16. The court below erred in stating in its Conclusion of Law No. 10 that the record in this case is insufficient for the Commission to determine whether or not Montana Power is receiving a fair return upon a fair value for its properties, and in assuming or inferring that the Commission used or relied upon information and evidence obtained outside the record without a full and fair hearing."

These specifications of error can be grouped into the following categories for discussion purposes concerning this case:

1. Was the October meeting a denial of due process by the Commissioners and if so did the subsequent hearing before the district court change the status of the rights of the protestants with regard to this October 4 meeting?

2. Were the actions of the Commission after the hearing, in sending employees to check statements made at the hearing, a denial of due process?

3. Was sufficient evidence received at the hearings to support the Commission's orders?

4. Were the gas leasehold interests included by the Commission, as part of plant production and made a part of the rate base, a proper inclusion?

Concerning the October 4 meeting, the respondents protested and filed a petition to reopen the hearings for the purpose of examining the witnesses of the

Montana Power Company, who the appellant Commission had called in to clarify certain matters relating to their Canadian properties. Demand was made that an opportunity be afforded for explanation and rebuttal. The appellant Commission's order of February 2, 1962, rejected and denied this demand. At this point in the proceedings there was timely and adequate assertion of the infringement of respondents' right calling for remedial action by the Commission.

We meet at the threshold of this opinion the fact that as to the request for a hearing to examine the participants the Commission erred in not granting the respondents' petition. Whether the respondents were prejudiced by this will be discussed later.

The fundamentals of a fair hearing were denied the respondents when a hearing was held when respondents were not present, and when the testimony of that hearing was not spread on the record.

Here, what was done by the appellant Commission is subject to a proper objection. From the standpoint of due process, the protection of the individual against arbitrary action, a deeper vice is this, that even now we are not certain what evidentiary facts were taken by the appellant Commission or whether or not it rested any of its conclusions on said evidence. The facts of the October 4 meeting, with the exception as to who was there, are uncertain, except for what Commissioner Smith and Boedecker testified to.

The district court did not rely on the testimony of the appellant Commission as to what happened at the October 4 meeting, holding on the evidence produced before it that due process was denied respondents by the very holdings of the meeting.

This court has recognized that the regulatory commissions of this state are invested with broad powers within their sphere of administration authorized by the legislature. Tobacco River Power Co. v. Pub. Service Comm'n, 109 Mont. 521, 98 P. 886. Even in quasi-judicial proceedings their informed and expert judgment receives proper consideration by the courts of this state when such judgment has been reached with due consideration of constitutional restraints. Baker Sales Barn, Inc. v. Montana Livestock Comm'n, 140 Mont. 1, 367 P. 2d 775. Much that is done by these administrative agencies of the state, within the realm of administrative discretion, is exempt by the legislature from supervision by the courts if those restraints are obeyed. Therefore the need is great, where power has been bestowed so broadly, that the safeguard of a fair hearing be maintained in its fullest. The right to such a hearing is one of the rudiments of fair play assured every litigant by the Fourteenth Amendment to the Constitution of the United States, and section 27 of Article III, Montana Constitution, as a minimal requirement. This cannot be comprised on the altar of convenience or expediency.

This court has often spoken out against the abuse

of power by state boards. In the case of State ex rel. State Board of Equalization v. Kovich, 142 Mont. 201, 383 P. 2d 818, we recently said: "This court has uniformly held that the State Board's actions, if arbitrary, fraudulent, or contrary to law, are void and will be so declared by the court." See also State ex rel. Reid v. District Court, 134 Mont. 128, 328 P. 2d 634; Johnson v. Johnson, 92 Mont. 512, 15 P. 2d 842.

Concerning the Industrial Accident Board's activities, two recent opinions of this court, State ex rel. Fish v. I.A.B., 139 Mont. 483, 385 P. 2d 83, we have pointed out that all administrative boards and tribunals should zealously guard against any appearance of unfairness in the conduct of their hearings. Too, we notified all such administrative agencies in these opinions that the court "will carefully review all administrative hearings to guarantee the fair conduct of their hearings."

In considering the activities of the Montana Livestock Commission, this court in Baker Sales Barn, Inc. vs. Montana Livestock Comm'n, 140 Mont. 1, 9, 367 P. 2d 775, stated:

"It needs no citation of authority to say that this discretionary power is not an unrestricted power. It must be based on a reasonable use of the power. The statute, section 46-909, establishes the limits of the power in as reasonable a manner as words can describe. On review provided in the district court under section 46-917 the legislature specifically left dis-

cretion in the Commission and left to the court only the duty to examine the records made before the Commission to determine whether the latter acted, 'capriciously, arbitrarily, or abused its discretion and whether it acted according to law.' That this is proper has been discussed by this court in Peterson v. Livestock Commission, 120 Mont. 140, 150, 181 P. 2d 152, 157, wherein it was said:

" 'The only proper questions that may be tried by a court on appeal from an order such as the one here involved is whether the commission acted capriciously or arbitrarily or without jurisdiction or authority under the law.' "

In a number of opinions this court has considered the activities of the Montana Milk Control Board, and in the latest opinion of this court concerning due process we said quoting from Nebbia v. New York, 291 U.S. 502, 54 Sup. Ct. 505, 78 L.Ed. 940, "due process * * * demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have real and substantial relation to the object sought to be attained.' " Montana Milk Control Bd. v. Rehberg, 141 Mont. 149, 376 P. 2d 508.

In considering the taxing power of a county, the court, in Great Northern Ry. Co. v. Roosevelt County, 134 Mont. 355, 332 P.2d 501, quoting from Mullane v. Central Hanover Bank & Trust Co., U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, said: " 'An elementary and fundamental requirement of due process in any pro-

ceeding which is to be accorded finality is notice reasonably calculated, under all these circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" See also Opheim v. State Fish & Game Comm., 133 Mont. 362, 323 P.2d 1116.

A review of these opinions indicates that this court has carefully charted the procedural course for the administrative quasi-judicial agencies, both legislative and executive, however, this court's opinions have recognized that these quasi-judicial commissions have wide latitude in matters of discretion in considering the factual evidence. The court has pointed out that it is the duty of the court to examine the records made before the commissions to see that they do not act capriciously, arbitrarily or abuse their discretion and whether they acted according to law. Our numerous opinions concerning these administrative bodies have cautioned that they would be strictly held to the elementary and fundamental requirements of due process in all of their proceedings.

It almost goes without saying, because it is so self-evident, that an ex parte relationship of this type between quasi-judicial officials and litigants is improper. If engaged in by a judge it would clearly violate Canon 17 of the Canons of Judicial Ethics which states:

"Ex parte Communications. "A judge should not permit private interviews, arguments or communications designed to influence his judicial action,

where interests to be affected thereby are not represented before him, except in cases where provision is made by law for ex parte application."

For the appellant Commission to have indulged in such an ex parte relationship is equally improper. It violates the basic principles of American administrative law, that of so-called "exclusiveness of the record" under which administrative decisions are to be based solely on the public record. If one is empowered to act as a judge he should conduct himself as one.

Had the factual situation concerning this October 4 meeting remained as it did at the time it was heard in the district court, there would be no question that the Commission's action might have been reversible error. However, what happened at the district court hearing, as concerned the October 4 meeting, must be considered in light of the allegations made by respondents here on appeal.

In the pre-trial order of Judge Hatfield one of the issues of fact concerned this meeting.

(1) Concerning the meeting of October 4, 1961, were matters of explanation and evidence, if any, presented to the Commission without opportunity for cross-examination and rebuttal?

Too, one of Judge Hatfield's issues of law was:

(1) May the Public Service Commission hear explanations and evidence, if any, at a meeting with The Montana Power Company officials without consent or permission of plaintiffs or opposing groups?

Having thus framed an issue of fact and an issue of law to be presented, the burden of proof fell upon the appellants, The Montana Power Company and the Commission and the record before Judge Hatfield shows that they complied in every respect with the court's inquiry into the law and the fact of the October 4 meeting. All the officials of The Montana Power Company who participated in the October 4 meeting were present and available for direct or cross-examination by the respondents. In addition, the Commission had available two commissioners, Smith and Boedecker, who participated, plus William Johnson, Commission Auditor, and William Mufich, Commission Attorney. The latter two employees of the Commission were the persons designated by the Commission to make the post-hearing audit demanded by the respondents at the end of the hearing. With all the participants present, a full opportunity was accorded respondents to bring out all the facts, and to explore all of the ramifications of the October 4 meeting, plus any information they desired to obtain on the post-hearing audit made by Johnson and Mufich. They chose not to examine all the participants at the meeting but concentrated on Commissioners Smith and Boedecker, even though the latter constantly stated in his testimony that it would be necessary to get that information from either Mr. Johnson or Mr. Mufich.

A summary of Commissioner Smith's testimony

showed that Smith called the meeting with Boedecker's agreement. The Company officials were summoned to Helena as Commissioner Smith testified "to make the answer more clear than was in the record in Butte." He further stated that the information solicited did tend to clear up some questions he had but did not change his opinion as to the outcome of the case. It was not until he was cross examined by counsel for the Power Company that Commissioner Smith was tied down to what actually took place at the October 4 meeting, and it was shown that his problem with the transcript occurred over the testimony given by Mr. Harrington, the company treasurer, concerning income tax payments in the United States and Canada, and the reason Smith was troubled by the testimony was that he was not present when the testimony was given.

The next witness, J. J. Harrington, vice-president and treasurer of The Montana Power Company, was called and gave testimony concerning the income tax situation, but no question was directed to him concerning the October 4 meeting by the respondents. Counsel for the Power Company had to point this out, before the witness left the stand, and when the respondents chose not to go into the testimony of the meeting they said they would bring him back as their witness which they did.

Commissioner Boedecker was called and examined extensively concerning the post-hearing audit but not one question was asked on the October 4 meeting.

Counsel for the appellant Power Company reserved the right to recall Mr. Boedecker on the basis of what happened at that meeting. When examined and cross-examined as to this meeting, and its effect on the ultimate decision, he concurred with Commissioner Smith as to what happened at the meeting, and said what he learned did not change his opinion or affect the ultimate decision.

Mr. Harrington testified fully as to what he told the commissioners at the October 4 meeting and it agreed in almost every detail with what Commissioners Smith and Boedecker had previously testified to concerning United States and Canadian income taxes.

With this testimony concerning the October 4 meeting, particularly the detailed statement by Mr. Harrington, the burden shifted to respondents to show damage to them resulting from the meeting. Having failed to do so, we cannot agree with the respondents' contention that the very denial of their right to cross examine immediately after the October 4 meeting denied them due process, in view of the record made here.

This court has previously said that where the statutes provide for judicial review of a particular order made or agreed upon by a prejudiced commissioner there is no denial of due process. State ex rel. Mueller v. District Court, 87 Mont. 108, 285 P. 928; State ex rel. Holt v. District Court, 103 Mont. 438, 63 P. 2d 1026; Montana Power Co. v. Public Service

Commission, (D.C. Mont. 1935) 12 Fed. Supp. 946.

Regardless of the innuendo caused by the one-sided meeting called by the Commission, this court must assume that elected and appointed officials of this state who take oaths of office will live by that oath in the performance of their duties and will act honestly in accordance with law in the performance of their official duties. To hold otherwise would be to impede the operations of our state government.

Having failed to show that the meeting of October 4 changed the Board's decision even though the opportunity was availed them by having all persons available for examination, we find that the district court erred in holding that the respondents were denied due process.

The Railroad and Public Service Commission of this state differs from other administrative agencies of our state government in that it is a department of our government created by the legislature, whose officials are elected to carry out and promote a legislative function. It is unique, in that it combines regulatory functions of a railroad commission, plus rate-making duties of a public service commission, which in most states are handled by separate commissions. Therefore, much of the case law of other states has no application to Montana. State ex rel. City of Billings v. Billings Gas Co., 55 Mont. 102, 173 P. 799; Billings Utility Co. v. Public Service Comm'n, 62 Mont. 21, 203 P. 366; Montana Citizens' Freight Rate Ass'n v. Board of Railroad Comm'rs,

128 Mont. 127, 271 P. 2d 1024; State ex rel. James v. Aronson, 132 Mont. 120, 314 P. 2d 849.

This court has pointed out that it is a legislative function to regulate public utilities and that the legislature can do so through an administrative agency. Too, that the acts of this agency are legislative and not judicial. Billings Utility Co. v. Public Service Comm'n, supra. Being a legislative function of our government, this court is always confronted in rate-making cases with the question of how far the court can go in interfering with, or directing the exercise of power, by an equal department of government. We have repeatedly held that there will be no interference with the orders of the Commission unless:

(1) they go beyond the power constitutionally given; or,

(2) beyond their statutory power; or

(3) they are based upon a mistake of law.

However, questions of fact may be involved in determination of questions of law, so that an order, regular on its fact, may be set aside if it appears:

(1) that the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or

(2) that the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it, or

(3) that the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that substance,

and not the shadow, determine the validity of the exercise of the power. This rule was first set forth by this court in Billings Utility Company v. Public Service Comm'n, supra, and has more recently been followed in State ex rel. Olsen v. Public Service Comm'n, 131 Mont. 104, 308 P. 2d 633; Mountain States Telephone and Telegraph Co. v. Public Service Comm'n, 135 Mont. 170, 338 P. 2d 1044; Montana Citizens' Freight Rate Assn. v. Board of Railroad Comm'rs, 128 Mont. 127, 271 P. 2d 1024.

In Montana, the elected officials of the Commission, acting within their constitutional power, and in a legislative capacity, are accountable under their oath of office to the people only, just as are the members of this court, and this court will not interfere so long as they follow the law and the decisions of this court. The forum in which their actions are to be judged is in the minds and consciences of the people, whose servants they are, and who alone can hold them responsible for the manner in which they perform their duties.

With the district court's conclusions of law and findings of fact that the respondents were denied a full and fair hearing, and that the due process clauses of our State and Federal Constitution were violated because of the post-hearing audit made by two employees of the Commission, we do not agree:

First, this audit was requested by respondents' counsel at the end of the hearing in Butte.

Second, a full and complete hearing lasting many

days had taken place with both sides given ample opportunity to present all the evidence they had and to cross-examine opponents' witnesses.

Third, the Commission gave respondents permission, during the hearings at Butte, to go into the Company books with their expert witnesses.

Fourth, in this case, the Commission hired an independent rate expert, Dr. John W. Kushing from Michigan. This employment of an independent rate expert to represent the State, seemingly fits the expressions in Mr. Associate Justice R. V. Bottomly's dissent in State ex rel. Olsen v. Public Service Comm'n, supra, 131 Mont. 104, at p. 118, wherein he commented that under our statutes "The Commission in expressing its power of regulating rates of a utility corporation must itself make its **due investigation** and appraise the value of the utility's properties, determine for itself the costs of operation, allow for depreciation, and designate a rate or rates that allow a fair return on the actual bona fide investment.

"It is the duty of the Commission to limit and regulate the use of the property, so far as profit and quality of service rendered is concerned.

"When the Commission simply sits as an automaton, without exercising its own initiative in determining all these factors by and through its own engineers, examiners, experts, accountants and other assistants provided for the Commission by R.C.M. 1947, § 70-118, and simply takes the testimony of the utility on

such matters and questions, the Commission is not, in my opinion, fulfilling its duties and responsibilities to the public under the law of its creation.

"By reading the whole of Title 70, Public Utilities, Chapter 1, R.C.M. 1947, it seems clear that the intent of the Legislature was that the State Public Service Commission would, through its own agents, make full disclosure of all matters under consideration, so that the members of the Commission could then check and weigh the facts developed by its own due investigation as against the evidence produced before it by a utility.

"It appearing that the Public Service Commission failed and omitted to make any independent investigation herein as is provided for and required by the above statutes, I would reverse the judgment and send the matter back to the Commission to enable it to fully perform the duties so imposed upon it and thus allow it to make its own investigation and determination of the facts and circumstances before approving or allowing any rate increase whatever."

Fifth, Commissioner Smith testified that it was a commonly-accepted practice after a hearing for the Commission to have their experts check and investigate statements made before they issued an order.

Sixth, that the Commission was following the law in making such an investigation where they have questions, such an investigation being permissive under our statutes, State ex rel. Olsen v. Public Service Comm'n, supra.

Seventh, the respondents failed to call Mr. Johnson and Mr. Mufich, who made the audit, the most important witnesses as to what they did during their independent audit.

Eight, under Rule 3.7 of the Commission Rules of Practice: "The Board reserves the right to conduct any independent investigation either before **or after** hearing to the end that it may be fully informed." (Emphasis supplied.) The Commission has delegated authority by law to establish rules and regulations for the conduct of their affairs; such rules and regulations have the force of law. State ex rel. James v. Aronson, 132 Mont. 120, 140, 314 P. 2d 849.

A careful examination of this voluminous record fails to substantiate respondents' contentions and Judge Hatfield's findings that concerning the post-hearing audits by Commission employees, that the Commission based its judgment upon evidence or information not in the record.

Concerning the sufficiency of the evidence, this court has often held that in reviewing the evidence the presumption is that the judgment is correct and every legitimate inference will be drawn by this court to support the findings of the lower court. State ex rel. Raw v. City of Helena, 139 Mont. 343, 363 P. 2d 720; Nissen v. Western Construction Equip. Co., 133 Mont. 143, 320 P. 2d 997.

However, after a careful study of all the testimony presented, we are unable to agree with Judge Hatfield that such a presentation was not made at the

hearings before the Commission and before his court as would not come within the holding of this court in the Tobacco River Power Co. v. Public Service Comm'n, case, 109 Mont. 521, supra. There the court, at p. 529, said in considering section 70-106, R.C.M. 1947 (then section 3884, R.C.M. 1935), "that considerable latitude is allowed the Public Service Commission in determining value. Neither the Public Service Commission nor the utility company is limited to or bound by any particular method in arriving at the solution of the question of value. It must be borne in mind always that the ultimate fact to be determined is value upon which rates are based, which must of course be done under proper legal procedure and restrictions.

"The cost of reproduction new, less depreciation, is usually regarded as one of the most important, if not the dominant factor, in the determination of value. *** Under the section of the Montana code just cited, assessment rolls are likewise admissible as evidence of value, but of course are not exclusive ***. Original cost, assessment values, cost of reproduction new, prudent investment theory, public records mentioned in section 3884, supra, and opinions of value are all means to an end, namely, in the determination of value.

"We can find no error in the procedure of the Court in allowing evidence of cost of reproduction new, less depreciation, to be admitted as evidence of value."

The district judge carefully considered the evidence produced at Commission hearings and thoughtfully applied the proper case law to his findings. He recognized the "substantial evidence rule" followed by this court in our most recent cases: State ex rel. Olsen v. Public Service Comm'n, 131 Mont. ,104 supra; Mountain States Tel. & Tel. v. Public Service Comm'n, 135 Mont. 170, supra. Where we disagree is with his conclusions that within the record made at the hearing there is insufficient evidence to sustain the Board's orders. We find the record sufficient to uphold the Board's orders.

The complaint filed in district court by respondents seeking to set aside Order No. 2897 had alleged in part:

That it allowed Montana Power to use in calculating its rate base certain gas reserves consisting of natural gas in place "under grounds in and to which Montana Power has no property interest other than as a Lessee under an oil and gas lease."

That it included in the rate base leases on which no royalty was being paid and upon which there was no production.

These issues had been carefully analyzed by the Commission in its Order No. 2897. To show the extent and rationale of the Commission we shall quote at length from Order No. 2897.

"THE RATE BASE

"The Company presented the following valuations for the combined natural gas operations for the test

year 1962 for the Commission's consideration:

	1962
"Reproduction Cost New Depreciated (RCND)	$118,413,926
"Original Cost (OC)	85,118,839
"Original Cost Depreciated (OCD)	60,144,210
"Materials and Supplies	416,806
"Working Capital	501,510

"In this proceeding much was made of the natural gas leases held by the Company and whether they should be included in the rate base when royalties are not being currently paid.

"The protestants argued that under the uniform system of accounts that leases upon which royalties were not being paid should be included in the account property held for future use. Accounting-wise this is undoubtedly correct. However, whether it is in the best interest of the Company and the rate payers to include this account, or part of this account, in the rate base is a matter for the judgment of the Commission. ***

"The Commission has made a detailed study of the leases in question and finds that most of them are leases adjacent to producing leases. It appears to this Commission that it is only good business acumen for the Company to obtain leases protecting leases already held by the Company and that such leases are properly includable in the rate base.

"However, the Commission finds some of the leases in question are not properly includable in the

rate base. The Commission has deducted from the plant figures submitted by the Company the following valuations:

RCND $478,200 OC $435,900 OCD $435,900

"Since the close of the hearing the Commission has been advised by the Company that they had surrendered leases 94657, 94659 and 94669 to 94679 inclusive. The following reductions were made as a result of this information:

OC $125,300 OCD $125,300

"Separation of the Canadian properties from the United States properties was advocated by the protestants.

"The protestants alleged that with the lower income tax rate in Canada, separating the properties would result in an operating expense reduction for the Company's combined operations. The basic premise set forth by the protestants being that a lower rate of return in Canada on production plant and a higher rate of return in the U. S. on production plant, as testified to by Company witnesses, would result in higher earnings and higher income taxes in the United States. The figures to which the witnesses referred were developed as part of a cost of service study. The Commission in setting a rate of return cannot set a rate of return on each component of plant.

"The Commission must set a rate of return on the fair value of the Company's plant used and useful to the public as a whole.

"The protestants also question the Commission's

authority to consider any plant for rate base purposes not located within the boundaries of the State of Montana. The Commission has previously taken the position of considering for purposes of establishing a rate base any plant used and useful to the consumers of Montana, geographical location not being a factor. Re Montana Power Company (1958) 24 PUR 3d 321; RE Montana Dakota Utilities Co. (1949) 78 PUR (NS) 33, 46. The Commission reaffirms this position in the instant proceedings.

"The only question remaining on the subject is then whether a border price should be established or whether the Canadian properties should be considered as part of the Company's properties as a whole and the Canadian operating expenses "rolled in" with the other Company operating expenses as shown on Exhibit 10. With a "rolled in" system as a result of three companies being involved there necessarily follows a duplication of expense in the purchase of gas. The Commission has determined that this duplication of expense was "washed out" on Exhibit 10. No evidence was introduced showing that an establishment of a border price would necessarily result in lower rates to the Montana consumer.

"The Commission, after a thorough investigation of the "separations" theory, is of the opinion that by using the "separations" theory with the concomitant border price establishment they would lose control over the Canadian operations.

"The Commission is further of the opinion that the "rolled in" theory referred to above is the method by which they can best keep control of the Canadian operations of the Company with the resultant benefits afforded the rate payers.

"The protestants also in regard to the plant accounts, questioned the propriety of entering the Pakowki Lake properties in the books of the Company at $10,000,000, the purchase price claimed by the Company. The protestants showed that after a $2,000,000 down payment the balance was a non-interest-bearing contract of $8,000,000 payable at the rate of $500,000 per year for sixteen years. Protestants argued that interest in a transaction of this sort should be implicit and the face value of the contract should be discounted at the prevailing interest rate at the time of entering into the contract.

"The Commission agrees with the protestants that this contract should be in effect discounted and that the part found to be interest should be removed from the valuation figures submitted by the Company. The Commission believed this necessary to forestall interest creeping into the capital accounts.

"It is now necessary to determine what interest rate is applicable. The protestants argue that the interest rate should be that interest rate prevalent in Canada at the time of the transaction. However, it is evident from the history of the Montana-Canadian

Gas Company that it has depended upon The Montana Power Company for its financing. Therefore, the Commission is of the opinion that it should look at the interest rates available to The Montana Power Company at the time of the transaction. The Commission has obtained from the records of the Federal Reserve System information that the "prime" interest rate ranged from 2% in 1950 to 3% for the year 1952. The time involved is limited to 1950 through 1952 because the purchase contract was signed in 1950 and the $2,000,000 down payment was made in 1952. Moody's shows that new publicly offered bonds for the same period had a high yield of 3.25% for AAA bonds and a high yield of 3.4% for AA bonds. Therefore, the Commission has determined that this $8,000,000 contract should be discounted at a 3.25% rate.

"On an amortization basis this would leave the principal amount of the contract at $6,162,180 and the interest payments over the sixteen year period at $1,837,820. The Commission realizes that using an amortization basis will result in a higher total interest figure than if serial bonds were used. However, with the evidence presented this is the only method possible to use. The Commission therefore reduces the valuation figures submitted by the Company by the following amounts:

"OC $1,838,000 and OCD $1,838,000.

The interest payment for the test year would amount to $101,000. This would of course have an income

tax effect and will be discussed later under Operating Results.

"The RCN valuation of the Company's gas reserves came in for considerable discussion. The Company revalued their reserves on the basis of a transaction with the State of Montana. This resulted in an increase in valuation of some nine times. The Commission does not believe that valuation by a spot transaction such as this truly reflects the value to the user of the Company's properties. The Commission is well aware that the value of these reserves has increased since the Company obtained possession. However, it feels that this type of valuation is what the Court was referring to in Willcox v. Consolidated Gas Co., 212 U.S. 19, 52, when it said in holding that the Company was entitled to a return based on the enhanced value of its properties in excess of original cost:

" '**** This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public.'

"The brief of the Great Falls Gas Company interjected another treatment of gas reserves. They argued that natural gas being a wasting asset its value should be removed from the element of value, original cost, as it is depleted.

"The Commission is in accord with this reasoning.

The Commission has investigated the records of the Company and has determined that on December 31, 1962, there would be $5,575,000 accrued depletion on production lands. The original cost valuation submitted by the Company will be reduced by this amount. The Commission will also reduce the RCND valuation for gas reserves by $6,765,000 as it believes this will then place the revaluation of the gas reserves at an amount not repugnant to fair earnings and corresponding rates.

"Most of the RCN studies by the Company were made with the aid of mutipliers developed from the Handy-Whitman Index. A representative of the firm publishing this index made a review of the study of the Company and the figures presented to the Commission were a result of the review and the study. The Commission's expert witness, a graduate engineer, also reviewed this study at the request of the Commission and expressed his approval of the methods used and the results of the study.

"The Comission however is not satisfied with the manner in which well-drilling costs were reproduced. The Company witness testified that in his opinion the well-drilling costs for the period 1932-34 were above normal. In reviewing the RCN studies, the Commission found that the multiplier used to arrive at RCN values had been applied to these above normal costs as well as the normal costs. The Commission believes that these above normal costs should have

been normalized before applying the .multiplier Therefore, the Commission finds that the RCN valuation was overstated by $808,500. As a result of this finding the RCND valuation is being reduced by $582,400.

"The plant figures submitted by the Company, other than the above, will be accepted by the Commission.

"The Company also requested that the rate base include $416,806 for materials and supplies and $501,510 for working capital. The tax accruals are sufficient to supply the working capital necessary and the $501,510 is disallowed. It has been found in previous cases that normally 50% of the materials and supplies account is used for maintenance and 50% for construction. The Commission will follow precedent and allow $208,403 for materials and supplies.

This Commission in recent years has used fair value as opposed to original cost depreciated in determining the rate base in all rate cases where evidence supporting fair value has been introduced. The determination of fair value is always a problem of some magnitude.

"The assessed valuation for 1962 of course was not available to the Commission. The 1960 assessed valuation of total properties was $29,329,436. This increased to $32,707,063 in 1961.

"The Commission has considered the elements of value listed above and after giving weight to the valuation changes hereinbefore enumerated and after also

giving weight to the purchase of service lines hereinafter ordered, the Commission sets the projected fair value of the Company's combined natural gas United States and Canadian properties devoted to the use of the public and actually used and useful for the convenience of the public at $89,900,000 as of December 31, 1962."

The foregoing lengthy quotation is set forth to show the very careful attention given to the problem of rate base. The Commission determined just what gas leaseholds and gas reserves were used and useful as required by our statute, R.C.M. 1947, § 70-106 (and see State ex rel. Olsen v. Public Service Commission and Mountain States Telephone and Telegraph Company, 131 Mont. 272, 309 P. 2d 1035).

The valuation of the gas reserves was the only evidentiary question on the rate base raised by the district court's order of April 26, 1962, and by the court's findings of fact. The record is abundantly clear that complete, detailed information in the form of testimony and exhibits was introduced. It is true that the subject matter and testimony concerning it is complicated but nonetheless it is abundantly clear.

As reflected by the commission order previously quoted in part, the Commission did not accept the Company figures at face value but applied its own reasoning and study to reduce the fair value figure of the Company from $118,413,926 to $89,900,000. Of this reduction, some are spelled out; but as to that applying to gas reserves they are not in detail, lease

by lease. As to the gas reserved the Commission analyzed the mass of evidence as to value and then in the exercise of its discretion reduced the figure by $6,765,000. It is interesting to note that protestants' exhibit 40 listed the leases upon which the Company was not paying royalty as being of a value of $8,105,421. Exhibits 44 and 45 are detailed showings as to the then present status of the leases referred to in Exhibit 40. Certainly from such a wealth of information the Commission could, as it did, exercise its discretion in placing its valuation on gas reserves that are actually used and useful for the convenience of the public.

The Commission's decision finds support in the evidence and thus the district court was in error in setting it aside.

The writer of this opinion respectfully dissents to the latter conclusion of a majority of this court that the Commission decision finds support in the evidence insofar as the value of gas leaseholds included in the rate base are concerned. The evidence produced by the appellants concerning the gas reserves is not limited to the specific reserves owned by the appellant Company or being presently utilized by appellant. A careful examination of the testimony, especially that given by Mr. Woy of the appellant Company, indicates some question as to whether or not non-producing leases were included in the rate base. While the appellants argue that sufficient evidence was produced, and that the appellant Commis-

sion did cut some $6,765,000 valuation off the Company's gas reserves, I am still of the conclusion that as to the reserves, further clarification should be had as to exactly what was included in the rate base in the field of presently producing leases and those held for future use. I agree with the district court that to charge the present day rate payer for something to be used in the future is placing an undue burden on already burdened rate payers. A public utility is entitled to such rates as will permit it to earn a return on the value of the property employed by it to the public benefit, but it has no right to profits such as are realized or anticipated from speculative ventures.

The value that must be ascertained is the reasonable value of the Montana Power Company's leases used and useful for the public service at the time it is being used and in the immediate future. I would remand to the district court with instructions to return the case to the Commission in order to give it an opportunity to reconsider the evidence on the gas leases used by the Commission in its rate-base computations. Such reconsideration of the gas leases would be had on notice to The Montana Power Company and protestants and be limited to the reserves owned and leased by the Company that were figured into the present rate, and whether or not speculative leases, not presently in use, were used by the Commission in their rate base. In so disposing of the lease question, I would not have held that the protestants are entitled to a decrease, nor that the Company was not entitled to the increase. It may well have been,

that upon reconsideration of the entire lease structure of the Company, that a reduction is called for. If such be the result reached, then in justice, the consumers should be entitled to the reduction as of the date of the Commission's original order. If the testimony did not show that non-user prospective leases were figured into the rate base by the Commission's Order, then the Order would remain unchanged.

However, as recited before, a majority of the court has found that there is ample testimony on the leaseholds as to being used and useful to support the Commission.

For the foregoing reasons, the judgment of the district court is reversed and Commission orders No. 2897 and 2897A are affirmed.

JOHN CONWAY HARRISON
Associate Justice

We concur:

JAMES T. HARRISON
Chief Justice
WESLEY CASTLES
STANLEY M. DOYLE
Associate Justices

Mr. Justice Adair dissenting:

In my opinion the District Court's judgment was and is correct and proper and I would affirm such trial court's judgment in its entirety.

HUGH ADAIR
Associate Justice

APPENDIX II

DENIAL OF PETITION FOR REHEARING

IN THE SUPREME COURT STATE OF MONTANA

No. 10610

CASCADE COUNTY CONSUMERS ASSOCIATION;
MONTANA CONSUMERS ASSOCIATION;
MONTANA STATE FLORISTS ASSOCIATION;
RALPH PARKER, an Individual;
ARTHUR SMITH, an Individual; and
LLOYD C. WENNER, an Individual,

Plaintiffs and Respondents,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA, PAUL T. SMITH, JACK HOLMES and LOUIS C. BOEDECKER, as members thereof and constituting said PUBLIC SERVICE COMMISSION OF MONTANA; and THE MONTANA POWER COMPANY, a Corporation,

Defendants and Appellants.

ORDER

PER CURIAM:

IT IS ORDERED that respondents' petition for rehearing herein be denied.

DONE this 9th day of September, 1964.

Thomas J. Kearney
Clerk of Supreme Court
State of Montana
ATTEST: A true copy

APPENDIX III

DISTRICT COURT ORDER

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF CASCADE

No. 55117

CASCADE COUNTY CONSUMERS ASSOCIATION, MONTANA CONSUMERS ASSOCIATION, MONTANA STATE FLORISTS ASSOCIATION, RALPH PARKER (an individual), ARTHUR SMITH (an individual) and LLOYD C. WENNER (an individual),

Plaintiffs,

—vs—

PUBLIC SERVICE COMMISSION OF MONTANA, PAUL T. SMITH, JACK HOLMES AND LOUIS G. BOEDECKER (as members thereof and constituting said Public Service Commission of Montana) and THE MONTANA POWER COMPANY (a corporation),

Defendants.

ORDER

This matter comes on before the Court as agreed in the pre-trial order as an appeal under Section 70-128, Revised Codes of Montana 1947, of Docket No. 4997 of the Defendant, Public Service Commission, fixing rates for natural gas service to be charged by the Defendant, the Montana Power Company.

This matter came on for a public hearing concerning the application of the Montana Power Company for authority to adopt new rates under Docket No.

4997 of the Defendant, Public Service Commission on the 23rd day of May 1961, in the House Chambers of the State at Helena, Montana, which hearing ran for two days. The matter was thereafter recessed and reconvened on the 18th day of July 1961, in the Silver Bow County Courthouse at Butte, Montana, and continued for twelve days of hearing and until the 2nd day of August 1961, when the hearing was closed and the matter taken under advisement by the Defendant Commission. It was agreed in the pre-trial order in this cause that the record should include the record below, certified by the Public Service Commission to the Court which consisted of 2,928 pages of transcribed testimony, plus voluminous exhibits and data sheets which were certified to the Court and to which this Court has devoted much study.

On October 27, 1961, after the hearing referred to had been closed and taken under advisement, the Montana Consumers Association, a protestant in the above-entitled docket, filed a petition with the Commission wherein it requested that the Commission suspend all further proceedings in the docket and that a further hearing be held for the purpose of examination of some of the witnesses of the Montana Power Company, and to allow the protestant to present additional evidence. In the affidavit supporting the petition, it was alleged that on Wednesday, October 4, 1961, the Montana Power Company made an informal appearance before at least two members

of the Commission with one or more of its counsel and two or more expert witnesses; that information was given to the Commission members pertaining to the rate of return on production property located partly in Montana and partly in Canada, which property the Montana Power Company had included as a part of its gas rate base in this docket. That there were no protestants present at such informal meeting and that the protestants were not given an opportunity to hear the information given, or to cross-examine, or to introduce rebuttal evidence. Further allegations are made in the petition pertaining to income tax matters and leases. The Order No. 2897 at page 17, dated the 2nd day of February 1962, at Page 17 states:

> "The Petition has been fully considered by the Commission. The allegations contained therein, together with the affidavits, do not set forth any matters upon which the commission should re-open this docket for further hearing, all the matters referred to having been considered in the hearing and ruled upon by the commission, except as to those matters taken under advisement and hereinafter decided. Based upon the foregoing, it is the opinion of the commission that the petition should be dismissed."

On the 2nd day of February 1962, the Order No. 2897 was issued on Docket No. 4997. Thereafter, Order No. 2897A in Docket No. 4997 was issued, which supplements Order No. 2897 changing the kind of rates that the Great Falls Gas Company may charge. Thereafter, on or about April 27, 1962, the

plaintiffs in this action filed this appeal under the provisions of Section 70-128 RCM 1947. The matter came on for hearing before the Court on August 15, 1962, at which time Paul T. Smith, Louis G. Boedecker, J. J. Harrington and L. S. Stadler were called as witnesses and testified. The hearing was then recessed with the agreement of the parties until September 5, 1962, at which time J.J. Harrington was called and gave additional testimony with relation to the Montana Power Income Tax, which was one of the additional exhibits received by the Court during the hearing. After the testimony was closed, oral argument was presented to the Court and the Court by its Order of September 6, 1962, ordered the testimony of the hearings had before the Court transcribed and further that the cause be remanded to the Commission with the testimony presented to the Court and that the Commission report its action thereon, to the Court within ten days after receipt of such evidence. By order of the Commission, dated the 10th day of October 1962, Style Supplemental Order No. 2897B, Docket No. 4997, did ratify and affirm in all respects Orders 2897 and Order No. 2897A.

At the close of the hearing on September 5, 1962, the Court ordered briefs submitted and the briefs having been received, the last reply brief of the plaintiff having been received by the Court on November 26, 1962, and in this connection, the Court wishes to commend all counsel involved in this litigation for the excellent briefs submitted.

In this cause, a pre-trial conference was had by the Court on the 10th day of July 1962, the results of which are reduced to writing and filed in this record. This pre-trial order sets out several contentions of the plaintiffs, one of which, the Montana Power Income Tax, has become moot for the reason that the tax return was submitted to the protestants and examination was made thereon. Other matters have been abandoned, either at the hearing or through failure of the plaintiffs' counsel to brief them as ordered by the Court, and, the Court specifically finds that as to matters and things not specifically in this decision mentioned, that in all other respects, Order Nos. 2897, 2897A and 2897B are legal and lawful.

Some preliminary statements should be made with respect to the function which this Court finds to be its obligation under the manner of this appeal. First of all, Section 70-127 RCM 1947 states:

> "All rates, fares, charges, classifications and joint rates fixed by the Commission shall be enforced, and **shall be prima-facie lawful,** from the date of the order until changed or modified by the commission, or in pursuance of the next section***" Emphasis supplied.

While many questions involved on this appeal are unique in Montana as far as we have been able to determine from the briefs submitted or our independent research of the case law in the State of Montana, the Montana Courts over the years have interpreted Section 70-128 consistently. The rule was

first set out in Billings Utility Co. v. Public Service Commission, 62 Mont. 21, 203 Pac. 366 as follows:

"The rates fixed, as by the statute directed, are prima facie lawful, can be attacked in court on the sole ground that they are unlawful or unreasonable, shall be deemed reasonable and just until final determination by the courts and the burden of proof rests on the party antagonizing the order.

"It is well-settled law that rate-making is purely a legislative act, and as such the power of the courts is circumscribed and restrained in interference with determination reached within the scope of legislative authority.

"The legislature itself has the undoubted authority to regulate public utilities, and by means of a duly constituted commission it operates through its administrative medium. 'The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind.' (Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Munn v. Illinois, 94 U.S. 113, 24 L. ed. 77; Peik v. Chicago & N. W. Ry., 94 U. S. 164, 24 L. ed. 97; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 28 L. ed. 1014, 14 Sup. Ct. Rep. 1047; St. Louis & S. F. Ry. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Interstate Commerce Commission v. Cincinnati, ect., Ry. Co., 162 U. S. 184, 40 L. ed. 935, 16 Sup. Ct. Rep. 700; Interstate Commerce Commission v Texas & Pac. Ry. Co., 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Cincinnati, etc., Ry. Co., 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Smyth v. Ames, 169 U. S. 466, 515, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; McChord v. Cincinnati & N. R. Co., 183 U. S.

483, 46 L. ed. 289, 22 Sup. Ct. Rep. 165 (See also Rose's U. S. Notes).

"The court has not the power to substitute its judgment for that of the commission, nor can it set the commission's conclusions aside when they have been made lawfully and reasonably, within the proper sphere of authority. 'There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the commission are final unless: (1) Beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) of the commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that substance, and not the shadow, determine the validity of the exercise of the power. (Citing cases.)

" 'In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling.

" 'The findings of the commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' (Illinois Cent. R. Co. v. Interstate Commerce

Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700.) **'Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof; but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.'** (Interstate Commerce Commission v. Union Pac. R. R. Co., 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108; see, also, State Public Utilities Commission vs. Springfield Gas & Elec. Co., 291 Ill. 209, 125 N. E. 891; Muskogee G. & E. Co. v. State (Okl.), 186 Pac. 730; Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission, 136 Wis. 163, 17 L.R.A. (n.s.) 821, 116 N. W. 905.)" Emphasis Supplied.

This rule has been announced and followed in the most recent Montana case, including State ex rel, Olsen vs. Public Service Commission, 131 Mont. 140, 308 Pac. 2nd 633, 1957, and Mountain States Telephone & Telegraph Company v. Public Service Commission, 135 Mont. 170, 338 P. 2d 1044 (1959), which in addition states:

"There must be clear and convincing proof showing manifest error before such presumptions can be overcome." Emphasis Supplied.

This rule is given emphasis and scope in the Montana case of Montana Citizens Freight Rate Association vs. the Board of Railroad Commissioners of Montana et al., 128 Mont. 127, 271 Pac. 2d 1024, which case decided in 1954, sustained Judge Clifford Holt's reversal of a Railroad and Public Service Commission order on the ground that there was insuffici-

ent evidence to sustain the order, wherein the Court at page 132, of the Montana Reporter states:

> "It is of course fundamental that neither the district court nor this court may substitute its judgment or opinion for that of the board. Its findings are deemed prima facie just, reasonable and proper." RCM 1947 sec. 72-133. And the courts 'should ascribe to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' Chicago, M., St. P. & P. R. Co. v. Board of R. R. Com'rs, Mont., 255 Pac. (2d) 346, 350.
>
> **"But if there be no evidence to support the findings of the board the courts have the right, and it is their duty when their jurisdiction is properly invoked, to intercede.** 42 Am Jur., Public Administrative Law, sec. 214, P. 644. Emphasis Supplied.

We further agree with the general principle to the effect that evidentiary questions of lower tribunals are not reversable for immaterial, minor or technical reasons, but must affect substantial rights of the party on the merits of the case.

The rule is well stated in 3 Am. Jur., **Appeal and Error**, Sec. 1003, P. 555, as follows:

> 'It is a fundamental rule of modern appellate procedure that in order to warrant a reversal, the error complained of must have been prejudicial to the substantial rights of the appellant or plaintiff in error. **Error going only to immaterial, minor or technical questions is not ground for reversal,** especially where it does not touch the controlling questions or where controlling questions are correctly decided. In other words, an appellate court will not search for reasons to reverse a case; the duty rests upon the appellant or plaintiff in error to show that error has intervened to this prejudice.' (Emphasis Supplied.)

This general principle has been made the law of Montana by statute as now codified in Sec. 93-2707-8, RCM 1947, and the Montana Supreme Court has applied the Rule repeatedly. See Healy v. First Nat. Bank, (1939) 108 Mont. 180, 89 P 2d 555, and Conway v. Fabian, (1939) 108 Mont. 287, 87 P 2d 1022, cert. den. 308 U.S. 578, 50 S. Ct. 94, 84 L ed 484, where the Montana Supreme Court held at p. 323:

> " • • • 'On appeal, prejudice is never presumed, and a judgment will not be reversed merely because the lower court erred; in order to work a reversal, it must affirmatively appear that the error has affected substantial rights of the defendant on the merits of the case.'

See also: Bookout v. White, 123 Mont. 459, 214 P 2d 861; Puckett v. Hopkins, 63 Mont. 137, 206 Pac. 422; White v. Chicago, M. & P. S. Ry. Co., 49 Mont. 419, 143 Pac. 561; Olson v. City of Butte, 86 Mont. 240, 283 Pac. 222; Copenhaver v. Northern Pacific Ry. Co., 42 Mont. 453, 113 Pac. 467; Russell v. Sunburst Refining Co., 83 Mont. 452, 272 Pac. 998; and Montana Livestock & Loan Co. v. Stewart, 58 Mont. 221, 190 Pac. 985.

This appeal involves three distinct things:

(1) The meeting had by the Commission with the Montana Power Company attorney and experts on October 4, 1961;

(2) The question of gas reserves which can be divided into:

(a) The sufficiency of record evidence to sustain the inclusion of gas reserves.

(b) The rejection of this evidence made by the commission in their order.

(c) Evidence obtained outside the record as to the value of gas reserves.

(3) The evidence obtained by the commission going outside the record to determine which lands in the production accounts are used and useful so as to be included in the rate base.

It will be necessary to review the nearly 3,000 pages of testimony in order to establish what was said in the record about gas reserves. It is to be noted that the Montana Power Company vice-president, Mr. Stadler, who is in charge of the gas department of the Montana Power Company was not called at any time during the initial hearings, but did take the stand during the appeal on August 15, 1962, but did not testify with relation to anything having to do with the valuation of gas reserves. Also, the company geologist did not testify with relation to valuation of gas reserves.

Mr. John Corette's testimony as to reserves did not go to their value and as the following testimony shows included other reserves.

(Tr. Page 467, Line 11, Corette.)

"A. *** We are only a partial owner of some of the lands in that area, **and the reserves which I gave you include not only the reserves on lands on which we have leases but the reserves in other lands in the field, the leases being held by other parties but the gas being contracted to us.**" Emphasis Supplied.

The testimony in this regard came from Mr. Frank H. Woy who testified that he is the executive assistant and manager of the department of rates and depreciation of the Montana Power Company (Tr. Page 180, Lines 18, 19, 20 and 21) and who testified:

(Tr. Page 197, Linse 7 through 25)

"Another figure necessary for determining the Reproduction Costs New less Depreciation figure was a value for gas reserves. In determining the value of our gas reserves, I used the figure which we had found it necessary to pay during the last two (2) years for the gas which we purchased in the Cobb Area and in several other sections in northern Montana for Gas In Place.

"These figures, which we paid, amounted to five point five two naught cents (5.520c) per MCF of Recoverable Gas and two point nine four four cents (2.944c) per MCF for gas which served as 'cushion' for allowing the production of the Recoverable Gas.

"All of the Gas Reserves of THE MONTANA POWER COMPANY were valued on this basis; and, incidentally, those values were on a fifteen point oh two five (15.025) pressure base."

(Tr. Page 212, Lines 1 through 8).

"Q. (By Mr. Robert D. Corette) Mr. Woy, I have been asked a question, and that is: You mentioned 'cushion gas' and 'recoverable gas,' and you gave the dollar or the price figures, but you did not give the percentage of 'cushion' and the percentage of 'recoverable,' could you do that, or do I make myself clear ***?"

(Tr. Page 212, Line 25, Mr. Woy replied)

"A. *** But I believe that your question related primarily to my testimony on EXHIBIT NO. 8,

where I was referring to the Reproduction Cost New Less Depreciation value which I place upon gas reserves and gas in storage.

Q. That is right.

A. In that particular case, where I referred to the price which we paid for 'native cushion gas,' as being the value which I placed on it, that 'native cushion gas' reflected the amount of gas at pressures less than one hundred pounds (100 lbs.), which are frequently considered as being the lower limit under current economic conditions of 'recoverable gas.' Does that answer your question?

Q. Can you tell us the percentages?

A. The percentages differ in every well, Mr. Corette, depending upon the initial pressure of that well. There is no fixed percentage."

(Tr. Page 1115, Line 3 Ans., Mr. Woy)

"A. From line number 28 on Exhibit No. 8 the total Reproduction Cost New Less Depreciation of the Total Natural Gas Operating System is shown as one hundred and nineteen million, three hundred and thirty-two thousand and two hundred and forty-two dollars ($119,332,242.00), from Data Sheet No. 58 the Montana Power Company Consolidated R.C.N. value as of the close of 1962 is shown as one hundred sixty-four million, four hundred thirty-seven thousand and five hundred eighty-one dollars, ($164,437,581.00)."

(Tr. Page 1129 Line 16)

"A. For the United States Interconnected System, the original cost of 'Land and Land Rights' is three million, six hundred thirty-one thousand, one hundred eighty-five dollars and forty-eight cents ($3,631,185.48).

"For the Lewistown Section, the same account

is fifty-four thousand, five hundred twenty-three dollars and thirty cents ($54,523.30).

"The original cost less depreciation for the United States Interconnected System is two million, three hundred fifty-one thousand, two hundred forty dollars and thirty-four cents ($2,351,240.34).

"The original cost less depreciation for the Lewistown System is forty-seven thousand, four hundred thirty-four dollars and thirty-eight cents ($47,434.38).

"The Reproduction Cost New less depreciation for the United States Interconnected System is eleven million, nine hundred and eight thousand, three hundred and seventy-eight dollars ($11,908,378.00).

"The Reproduction Cost New less depreciation for the Lewistown Section is three hundred and forty-nine thousand, eight hundred and twenty-two dollars ($349,822.00).

"Under the Canadian-Montana Gas Company for 1960, the original cost of land and land rights is eleven million, thirty-one thousand, two hundred twenty-four dollars and seven cents, ($11,031,224.07).

"The original cost less depreciation on that is seven million, nine hundred eighty-seven thousand, one hundred and nineteen dollars and sixty-two cents ($7,987,119.62).

"The Reproduction Cost New less depreciation is thirteen million, five hundred eighty-two thousand, one hundred and twelve dollars, ($13,582,112.00).

"Those represent the total of the Production Land and Lands Rights Accounts as of December 31st, 1960."

(Tr. Page 1157 Line 5, Mr. Woy).

"Q. But you did re-price the land and land rights in your production plant?

A. We did.

Q. Now, would you tell me what was the original cost of the production plant land and land rights as shown on page 1 of your RCN volume?

A. Page one of the RCN volume includes the property of the Montana Power Company exclusive of Lewistown, and on line 4 it shows an original cost of $3,685,708.78 as representing the original cost of account 2312.

Q. And that's in your production plant, is that not correct?

A. That's correct."

(Tr. Page 1158, Line 10).

"Q. I understand. Now, for this same account what is your RCN figure?

A. As of December 31, 1960 the same line 4 of sheet one of this RCN volume shows $34,220,900.

Q. So, in effect this original cost figure has been written up about ten times, is that correct?

A. It appears to be approximately nine times—nine and a quarter times as large as the original cost.

Q. And, in your other land and land right account, or for the other portions of the plant, is that correct?

A. For the transmission, distribution and general plant the land accounts were not changed."

(Tr. Page 1159, Line 8)

"A. The valuation which I placed on the gas reserves, and as I testified to on page 197 of the transcript, in the amounts of 5.520 cents per MCF for recoverable gas, and 2.944 cents per MCF for cushion gas when applied to the reserves owned

by the Montana Power Company as of December 31, 1960 resulted in that figure which I just quoted of $34,220,900.

Q. Did you take 5.52 times a portion of that reserve and 2.94 times another portion of that reserve to arrive at thirty-four million?

A. That is correct."

(Tr. Page 1160, Line 12).

"Q. Well does that mean that 2312.1, 2312.2 and 2312.3 are all reserves?

A. They have been treated as one hundred percent reserves."

(Tr. Page 1166, Line 13)

"A. The original cost as shown on the fifth line of the first sheet in the Canadian-Montana Gas Company section of our RCN volume was $10,967,997.22 as of December 31, 1960.

Q. What's the RCN figure?

A. The corresponding RCN figure, as of the same date, is $18,976,729. Now, that is the value placed upon the gas reserves. That again excludes 2312-4 and 2312-5.

Q. So, that if you take your original cost of the entire system approximating seventy-six million dollars, and to arrive at your RCN figure before depreciation of one hundred and fifty-five million you have in that—that difference is seventy-nine million dollars; roughly speaking, and in that seventy-nine million you have forty-two million dollars with respect to the gas reserves?

A. That is about right.

Q. So, more than half of the increase is due to the gas reserves, is that correct?"

(Tr. Page 1168, Line 6)

"A. That sounds like it's about right, Mr. Leaphart."

(Tr. Page 1184, Line 13)

"A. In arriving at the RCN minus 'D' in the amount of $12,258,200 for the total United States System in contrast with the $34,220,900 you will recall that I testified that in arriving at this thirty-four million we used the total initial gas reserves, whereas in arriving at the RCN minus 'D' we priced only the remaining gas reserves owned by the Montana Power Company. That explains the radical difference and makes a considerable difference from that nine to one ratio which went back to the original reserves."

(Tr. Page 1197, Line 6)

"A. No, I won't say that. We have the account 2312.

Q. In other words, it's the lump sum of 1, 2 and 3 isn't it?

A. It's the lump sum of 1, 2, 3, 4 and 5.

Q. Right. And, then we can substract 4 and 5?

A. We made an analysis to determine 4 and 5.

Q. Now, these accounts, according to the description in the commissioners handbook, says 'The account shall include the cost of land.' And, Number 2 says, 'The account shall include the cost of leaseholds.' And, Number 3 says, 'The cost of rights—the cost to the utility of natural gas rights.' In no case does it include gas in place, yet, you have included gas in place in account 2312 haven't you?"

(Tr. Page 1197, Line 25 Contg.)

"A. Excuse me. When we buy land we buy the land along with the mineral rights thereto, which includes the gas below those lands. The account, as we treat it, are land and land rights. If we buy the

reserve alone without the land then that would probably be classified properly under natural gas rights 2312.3. But, where we buy the land including the rights and the gas reserves it would be 2312.1 or 2312.2 if they are leaseholds which we have acquired."

(Tr. Page 1199, Line 2)

"Q. Well, now, gas—who does own gas under the ground?

A. If we have acquired the ground with the mineral rights we do ***.

Q. So, the company has kept its books on the basis that it owns the gas whether it has got possession of it on the surface or not, is that right?

A. Possibly I can answer you more clearly, Mr. Graybill, by saying that we keep our gas reserves on an owned and on a controlled basis. And, we have not valued the controlled gas reserves. We have only valued the owned gas reserves."

(Tr. Page 1200, Line 14)

"Q. As a matter of fact, Mr. Woy, don't you understand that gas is not yours until you have reduced it to possession?

A. I do not ***."

(Tr. Page 1203, Line 25)

"Q. In other words, I was right a while ago, and you did in fact value the gas separate from the land?

A. No, separate, instead of.

Q. Instead of. So, you neither followed the system of accounts as to valuing producing land, nor even as to valuing land. You valued something different, is that right?

A. No, I didn't value anything different.

Q. You've got me confused now, Mr. Woy, please explain?

A. I placed my value for RCN and RCN minus 'D' in terms of the gas reserves."

(Tr. Page 1452, Line 9, Mr. Hendrickson)

"Q. Well, in any event, did you include in this 2312 the properties defined in this uniform system of accounts for gas utilities?

A. I included those and I included the value of the gas reserves.

Q. Well, let me ask you this, did you include the value of gas reserves under this definition: 'This account shall include the cost of land on which producing natural gas wells are located'?

A. Partially there.

Q. Will you explain why you included gas reserves under that particular definition, Mr. Woy?

A. Because it has been my understanding that we owned the gas under the term Mineral Rights, but, as I say, it is a legal question, so you are getting an engineer's interpretation of a legal question."

(Tr. Page 1479, Line 10)

"Q. And, if I recall correctly, you were going to obtain some way to give us the account numbers under which we might find either, or both, gas reserves or natural gas. Do you have those figures with you now?

A. Mr. Hendrickson, in order to answer your question properly I will have to say that from a strict semantic standpoint, the words natural gas reserves I could not find in the Classification of Acounts, but in the 1937 NARUC Accounts under the account 503-2 depletion it says: 'This account shall include the charges for depletion of natural gas deposits or other natural gas—or resources

the book cost of which is included in utility plant in service which are applicable to the period covered by the income statement.' Then going back to acount 312, land and land rights, natural gas, it says: 'This account shall include the cost of land and land rights used and useful in connection with natural gas production.'

I then proceeded to an official publication entitled Interpretations of Uniform System of Accounts for Gas Utilities by Committee on Statistics and Accounts of Public Utilities Companies of the National Association of Railroad and Utilities Commissioners including all interpretations issued by the Committee on Accounts and Statistics, and with respect to Case Number G-42 the answer dealing with natural gas rights says as follows: 'The term natural gas rights as used in paragraph 'D' of account 250-2 reserve for amortization and depletion of producing natural gas land and land rights, and in paragraph 'K' of utility plant instruction 9 land and land rights is intended to apply to all natural gas producing land and land rights the costs of which are properly includible in account 330-1 natural gas producing land, account 330-2 natural gas producing leaseholds and account 330-3 natural gas rights when such property constitutes an interest in one pool of gas.' In other words, according to what I have been able to find, while the term natural gas reserves is not specifically used, the implication throughout the Classification of Accounts is that natural gas reserves are properly included in plant accounts; and the only plant account under which they can, in my interpretation, be properly placed is under natural gas land and land rights. Insofar as cushion gas is concerned, the only references to cushion gas occur subsequent to this 1937 Classification of Accounts, and in general deal with cushion gas in storage.

"The terms as they are generally used at the present time are gas in underground storage current and gas in underground non-current.

CHAIRMAN HOLMES: Now, the Commission has a little doubt about this—I am not sure he has answered the question. I don't think it is necessary that we go into these details."

(Tr. Page 1499, Line 1)

"Q. (By Mr. Hendrickson) In the figures given to you by—given by you rather—as to the RCN gas reserves of $34,152,680. Does this figure represent the number of cubic feet of gas that your company had in reserve at any one time?

A. It represents the initial reserves of all the fields which we now hold valued at the two prices which I stated ***."

(Tr. Page 1499, Line 24)

"Q. Do I understand then that at one time the Montana Power Company had over six hundred billion cubic feet of reserves in the State of Montana?

A. The initial reserves in Montana which the Montana Power Company—in the reserves which the Montana Power Company now owns at one time aggregated six hundred and fifty-nine million nine hundred and thirty-five thousand MCF."

(Tr. Page 1500, Line 23)

"A. The RCN undepreciated was calculated, and I believe I have said several times, upon the valuation placed upon the initial gas in place. It has nothing to do with the value of what we have now."

(Tr. Page 1502, Line 14)

"Q. (By Mr. Mufich) Mr. Woy, how much recoverable gas in total did you figure as of December 31, 1960, for your reconstruction cost new at

the 5.520 cents factor, both in a dollar value and in volume?

MR. CORETTE: Is that reconstruction or less depreciation?

MR. MUFICH: RCND.

A. Three hunderd eighty-one million three hundred ninety-four thousand MCF recoverable gas as of December 31, 1960, which I priced at 5.520 cents.

Q. (Mr. Mufich) Now, give us the same figures for December 31, 1962?

A. Three hundred twenty-six million seventeen thousand MCF as of December 31, 1962, which I also priced at 5.520 cents. Maybe it would be better if I would give you the dollar amounts associated with those two quantities. As of December 31, 1960, the dollars amount to $21,502,949 and as of December 31, 1962 the corresponding dollar amount was $17,996,139.

Q. Now, would you give us the same figures for the same dates on the 2.944 cents gas?

A. The non-recoverable gas which I valued at 2.944 cents as of December 31, 1960 aggregated $159,867,000 MCF sic. having a resulting value of $4,665,916. The quantity of non-recoverable gas and the dollars associated therewith are identical for the year ending December 31, 1962.

Q. Now, one other question. How is the original cost related to these values?

A. It is not related directly in any manner.

Q. What is it related to?

A. The original cost relates to the price which we pay for the natural gas which we own and for the land under which that gas is located and to the lease which it applies to along with the right to produce that gas royalty free."

(Tr. Page 1505, Line 15)

"A. There are always possibilities. The valuation which I have placed on this gas is the latest price which we have had to pay for gas in place applied to the latest estimates on the part of our geologists as to the remaining gas available to us under an owned conditoned sic. rather than under an own and controlled. sic.

Q. That is correct. In other words, you are not relating when you are putting a price on gas in place you are relating that to the operations of your company, you are merely taking a commodity and putting a value upon it?

A. That is correct."

(Page 1513, Line 9)

"Q. In other words then, in your estimate as to the value of the reserves that you have presented here at the 5.520 and 2.944—you have not broken that down to wells which are producing gas under your own property, which is producing under lease or leases just held which can produce, is that correct?

A. Your statement is correct because I merely valued the gas which we owned."

(Tr. Page 1514, Line 4)

"A. I took the total amount remaining gas reserves which were included in our land accounts—production land accounts and valued them. Now, they would correspond to an original cost represented by 2312—the old 2312—less about—I believe it's $6,000—which we have analyzed, and found applied to rights of way and other land rights. So, if you reduce that first figure by that amount and then add it to the 2312-1, the 2312-2 and the 2312-3, which I have given, then that is the corresponding original cost of the gas reserves which I have valued.

Q. And, that is what you have re-valued under your 5.520 and 2.944 cents?

A. That is correct.

Q. You have taken all of those in?

A. Yes."

The Commission's order on page 27 recites:

"The RCN valuation of the Company's gas reserves came in for considerable discussion. The Company revalued their reserves on the basis of a transaction with the State of Montana. This resulted in an increase in valuation of some nine times. **The Commission does not believe that valuation by a spot transaction such as this truly reflects the value to the user of the Company's properties** ***"

"The brief of the Great Falls Gas Company interjected another treatment of gas reserves. They argued that natural gas being a wasting asset its value should be removed from the element of value, original cost, as it is depleted.

"The Commission is in accord with this reasoning. The Commission has investigated the records of the company and has determined that on December 31, 1962, there would be $5,575,000 accrued depletion on production lands. The original cost valuation submitted by the Company will be reduced by this amount. **The Commission will also reduce the RCND valuation for gas reserves by $6,765,000 as it believes this will then place the revaluation of the gas reserves at an amount not repugant to fair earnings and corresponding just rates.**" Emphasis Supplied.

From this it is apparent that some method not of record submitted by the Great Falls Gas Company was used to reduce original cost. Then, the Commission reduced the RCND value of gas reserves by $6,-

765,000. There is no reference in the order as to where this number came from or how it was arrived upon, but it is apparent from this recitation in the order that the commission rejected the method by which witness Frank Woy valued this property.

In the hearing had before the Court with reference to this statement on pages 27 and 28 of the Order, Commissioner Boedecker testified on August 15, 1962, at page 47 of the transcribed testimony submitted to the commission at Line 8:

"Q. Also on page 28, you state that the RCN valuation for gas reserves will be reduced by the amount of 6,765,000. Where did you get that figure?

A. There again, **it was information that was related to us by Mr. Johnson and in conjunction with the independent audit in relation to the testimony that was in the transcript. Mr. Johnson prepared various schedules which included recoverable gas, non-recoverable gas, we also investigated the field price of gas, there was certain information obtained from the Federal Power Commission in relation to field prices of gas and in reviewing all this information we determined a valuation.**" Emphasis Supplied.

From the testimony it is apparent that the RCND value of gas reserves was $25,718,865 for December 31, 1960 and $22,662,055 for December 1, 1962. The corresponding figure for December 31, 1960 as an original cost figure for these production lands is $14,585,485 leaving an increase between original cost and RCND value of $11,133,380. The record discloses that the only testimony of record as to the amount of

gas valued and the per unit cost of value came from Mr. Woy. It is further apparent that the Commission's order rejected this method of valuation; from Mr. Boedecker's testimony, it is apparent that the Commission in arriving at their RCND figure for gas reserves of necessity made an independent investigation of value which is not in the original transcript or in the Court record and is not available to this Court or any other Court in determining evidence upon which the rate can be based. The Commission at page 29 of its Order No. 2897 cites with approval the Montana case, "Tobacco River Power Company vs. Montana Public Service Commission (1940) 109 Montana 521, 529-530, 98 Pac. 2d 886 said:

'It is observed from section 3884, supra, that considerable latitude is allowed the Public Service Commission in determining value. Neither the Public Service Commission nor the utility company is limited to or bound by any particular method n arriving at the solution of the question of value. It must be borne in mind always that the ultimate fact to be determined is value upon which rates are based, which must of course be done under proper legal procedure and restrictions.

'The cost of reproduction new, less depreciation, is usually regarded as one of the most important, if not the dominant factor, in the determination of value. (51 CJ 17) Under the section of the Montana Code cited, assessment rolls are likewise admissible as evidence of value, but of course are not exclusive. When the state condemns property of a landowner it frequently resorts to assessed valuations as evidence, but more often than not the jury will determine damages and valuation in excess of that set out in the assessment rolls. Original

cost, assessment values, cost of reproduction new, prudent investment theory, public records mentioned in section 3884, supra, and opinions of value are all means to an end, namely the determination of value.' *** Emphasis Supplied.

"The Commission has considered the elements of value listed above and after giving weight to the valuation changes hereinbefore enumerated ***."

From this quote it is apparent that they gave weight to original cost, original cost depreciated and most importantly to reconstruction cost new depreciated. Therefor, the $11,000,000 increase in the RCND value of gas reserves is a most substantial and necessary part of the gas rate base.

The Court will cite at length from the case City of Erie v. Public Service Commission, Pennsylvania, 1924, 123 Atlantic 471.

"The Commission correctly summarized the law in these words:

'Gas holdings should be included and evaluated only to the extent that they represent developed, used and useful territory, including a reasonable reserve for the continued functioning of the company in its public service. Such holdings should be included in the rate base at their present value.'

"Our difficulty lies in the paragraph immediately following the one quoted from the findings, wherein **the Commission says this value 'cannot be determined on the basis of what gas can be sold for in some particular locality or in the locality where it is produced.' This would be correct if the commodity value was all that was before the Commission and it was the basis on which present value was to be reached.** The Company produced witnes-

ses who testified the market value of the 16 selected warrants was from $7,212,000 to $10,000,000, and the Ludlow field $4,000,000. It appears these gas fields were developed, defined, and have been in actual operation producing gas from a known sand for a great many years, sufficient to show the quality. It is no longer doubtful, among those familiar with the business, whether expert geologists or engineers or practical gas-producing men, that the remaining life of the fields can be determined with reasonable accuracy—with as much accuracy as is used in dealing with ordinary affairs of life. While this may be said to be matters of conjecture, because not seen, as is a seam of coal, they may suddenly end, the frequency of this in a defined territory is remarkably small. It is on such examinations large sums of money are invested. Most of the witnesses base their estimates on their knowledge of the field in general. The location of the lands was shown, location of the wells, the date each well as drilled, its depth, the character of sand in which gas was found, its thickness, the initial open flow volume of gas, the initial present rock pressure, the line pressure, the volume of gas delivered January 1920, by each well into the line against the line pressure, together with the details of measurement on which the computation of the present volume is based. The Commission finds that the Elk fields had an average daily yield of 102,000 cubic feet, discharging into the lines against a pressure of 115 pounds, and an average daily yield from the Ludlow field of 34,000 cubit feet. Disregarding the testimony of Hill and Gaffney as to value, four other witnesses testified to a demand for the supply and what natural gas lands would sell for in and about that territory. The Commission, in valuing the gas holdings, stated:

'Taking into consideration the total gas holdings

of the respondent, with all the testimony bearing on their present value, we are of the opinion that the used and useful portions attributable to Pennsylvania should be included in the rate base of $5,500,00.'

"The lowest value under the evidence was $11,-212,000. It is apparent, from what the Commission said, they proceeded on an erroneous conception of the evidence. Much if not all of the same testimony would have been admitted as evidence of market value in condemnation of the same land. No attack was made on the competency, sufficiency, or credibility of the witness to establish the fact of general market value." Emphasis Supplied.

"The Commission must in some measure be controlled by the evidence before it. An order is not in conformity to law if based on reports not offered in evidence and not the subject of cross-examination. P. R. T. Co. v. P. S. C., 78 Pa. Super. Ct. 593; P. R. R. Co. v. P. S. C., 69 Pa. Super. Ct. 404, 411. **A finding without evidence is arbitrary and baseless** (Interstate Commerce Comm. v. Louisville & Nashville R. R. Co., 227 U. S. 88, 91, 33 Sup. Ct. 185, 57 L. ed. 431), and a mistake conception of the legal effect of evidence is equally fatal."

"Some of the confusion in regard to this evidence might be attributable to the company's submitting three theories of valuation—the present value, commodity value, and segregation value. The Commission disregarded all but the first. Keeping in mind the purpose for which this evidence was offered, the value of any mineral land must necessarily depend primarily upon demand, quality, cost of production, and price received for the marketed product. Oil, coal, ore, and other minerals are subject to this rule. These considerations must enter into market value. Ordinarily a witness in chief is not permitted to give details of cost or

price, but they are considered by the witness when forming an opinion as to market value. See Act of April 21, 1915 (P. L. 159; Pa. St. 1920, 21861, 21862), as to evidence in condemnation cases; also, Whitcomb v. Philadelphia, 264, Pa. 277, 107 Atl. 765; Marine Coal Co. v. P. McK. & Y. R. R. Co., 246 Pa. 478, 92 Atl. 688. The landowner, in a condemnation proceeding, is not limited to any one use, but is entitled to have the land considered for any and all uses. He may show that it is specially valuable for a certain, particular purpose, and that purpose may enter into the value before the jury. Cox. v. P. H. & P. R. R. Co., 215 Pa. 506, 64 Atl. 729, 114 Am. St. Rep. 979.

"The value of the land is not the selling price of a cubic foot of gas as applied to the supposed quantity in a given field; its value is fixed as a whole, or at so much an acre. If we exclude this evidence, the finding was not based on any evidence. The Commission rejected the segregation and commodity theories, with the evidence bearing specially on such values. To add to this discarded evidence the testimony above indicated leaves the case barren of testimony to support value.

"While the Commission must consider all the evidence presented, it is not a mere machine to record figures placed by witnesses, estimating value of the lands between the highest and lowest on the basis of a fair average. To a very large degree, if not entirely, it reaches a conclusion in the same manner as a jury in a condemnation case; like all triers of fact, they possess and must exercise a reasonable judgment. They may not indulge in capricious disbelief, or an undue disregard of the evidence submitted, and, as in this case, fix a value wholly disproportionate to the proven facts. **Where a finding exists showing a wide departure from undisputed evidence of a contrary**

import, of such magnitude as to show on its face an abuse of power, it becomes the duty of the court of first instance, exercising independent judgment in reviewing the record, to remand the case to the Commission for further report, so there may be placed on record the reason for declining to accept the evidence substantially as submitted, or recast the report if in error.

"Here is a difference of $6,000,000. It may be this deduction can be satisfactorily accounted for; if so, the Commission's report should be self-sustaining, answering in a large measure the relevant contentions of the respective parties. The ascertainment of the market value is not one of 'rules or formulas,' but on the basis of reasonable judgment.

"However, the present value of all the property is not necessarily to be considered in the rate base. Generally speaking, though property may have the value claimed, if a reasonable proportion of its energies or the used and useful property is not devoted to public service, it should not ask the consumer to pay a return on the excess not used in public service, allowing the course of a reasonable reserve. 'The rate may be reasonable, though it fails to produce an investment return of the legal rate of interest, as where the business has not been developed sufficiently to be remunerative, or the plant has been over developed to meet the probable future demands of the business. San Diego Land & Town Co. v. Jasper, 189 U. S. 439.' Ben Avon Boro v. Ohio Valley Water Co., 68 Pa. Super. Ct. 576, 577. As to such of the company's physical property produced as the result of human effort there is little difficulty, for the subject-matter may be seen and its use fairly determined; for illustration, we may name artificial gas plants, light, heat, and power companies, and other similar utilities.

"In ascertaining what part of the value of the gas lands not presently in service should be included in the rate base, we must consider the purpose for which the additional holdings were acquired and the physical characteristics unique to this class of lands. There may be something inherent in the land, its peculiar qualities, or the use that differentiates this from other properties. We may assume these properties were acquired for the interest and benefit of the rate-payer as well as the company. Gas is a fugitive substance; it has no fixed situs; when drawn from one well it may come from any part of the territory, as it flows from one well or piece of land to another. When gas escapes to other fields, the former owner's title is lost. As each year's use diminishes the supply, so one part of the tract becomes exhausted, and the entire field related thereto may be exhausted. Gas sometimes lies in a pocket in a known gas field. In this it differs from coal, ore, and other minerals, and is more like oil. There is no means of reproducing the product when once taken from the earth. The company gets only the gas inclosed in the reservoir, and there is no known means of determining the quantity inclosed therein. Like many utilities, its stategic, as distinguished from its monopolistic position in its chosen field may be an added circumstance, not only as to value but how much should be included in present value. While productivity may be considered, its place is and should be in value, and the market or present value should and as we read the evidence did, take in these conditions. Because of these qualities, while it may be possible to presently determine the value of the lands, in fixing the probable proportionate amount of future life of the entire tract applicable to used, useful and fair reserve, it may be, and no doubt is, impossible to delimit it with any degree of certainty either in

acreage or value. There can be no graduated values of gas lands fixed as a rate base under any theory presented to us that will consider property presently used and a descending ration until exhaustion appears that is not the result of a pure guess. Beyond that proportion of the lands reasonably necessary to the company's life, the rate payer should not be required to assume the remainder as a burden. **Though this may be difficult to determine, the Commission, acting as an administrative body in each case, must decide the question, as in all other matters subject to the right of appeal."** Emphasis Supplied.

See also City of Charleston v. Public Service Commission, West Virginia 1923, 120 Southeastern 398; American Indian Oil & Gas Co. v. City of Poteau, Oklahoma 1925, 235 Pac. 906; United States Fuel & Gas Co. v. The Public Service Commission, 14 Fed. 2d 209 at page 221, and this case on appeal, United Fuel & Gas Co. v. Railroad Commission of Kentucky (1928) 278, U. S. 300, 49 S. Ct. 150, 73 L ed. 390; United Fuel & Gas Co. v. Public Service Commission (1928) 278, U. S. 322, 49 S. Ct. 157, 73 L ed. 402; Columbia Gas & Fuel Co. v. The Public Service Commission (1934) 292 U. S. 398, 54 S. Ct. 763, 78 L ed. 1327; Dayton Power & Light Co. v. Public Utilities Commission, 1934, 292 U. S. 290, 54 S. Ct. 647.

In this record the Commission had only the testimony of Mr. Woy. It rejected Mr. Woy's testimony and somewhere determined that his RCN-D figure for gas reserves should be reduced by the sum of $6,765,000. Under the authority cited there is no record evidence to support the valuation placed upon

the gas reserves and included in the rate base by the Commission.

The remaining question goes to the sufficiency of record evidence and the necessity of hearing with relation to matters specified before:

(1) The meeting of October 4[illegible] together with the admission in the order with relation thereto set out on page 2 of this order.

(2) The admission in the order on page 22:

"The Commission has made a detailed study of the leases in question and finds that most of them are leases adjacent to producing leases ***.

"However, the Commission finds some of the leases in question are not properly includible in the rate base. The Commission has deducted from the plant figure submitted by the company the following valuations: RCND, $478,200; original cost, $435,900; original cost depreciated $435,900."

(3) Again at page 56 of the order the Commission stated as follows:

"At the close of the second half of the hearing, protestants made a motion that (1) the Commission order an audit of the books and records of the company regarding reproduction cost new figures submitted by the Company, and (2) that the problem of leases and what is included in Account No. 2312.1, 2312.2 and 2312.3 should be studied independently by the Commission. The motion as stated was taken under advisement at the hearing. However, after the hearing, the motion set forth above was granted, and the books and records of the Company were examined by the Commission with regard to the matters referred to in the motion."

(4) The admission as to valuation of gas reserves as set out at pages 19 and 20 of this order.

(5) The admission in the order about going outside the record to value the gas reserves as stated before at pages 19 and 20 of this order.

All these things go to the same question and that is what is necessary in such a hearing that it be lawful. With respect to this question the exhaustive annotation in 18 ALR 2d 552 entitled, "Administrative decision or findings based on evidence secured outside of hearing and without presence of interested party or counsel," is of great value. Mr. Justice Holmes stated in United States v. Baltimore & O.S.W.R. Co. (1912) 226 U.S. 14, 57 L ed. 104 33 S. Ct. as follows:

> "It would be a very strong proposition to say that the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them ***. Such an investigation quite different from a view by a jury taken with notice and subject to the order of a court, and different again from the question of the right of the Commission to take notice of results reached by it in other cases, when its doing so is made to appear in the record and the facts thus noticed are specified, so that matters of law are saved."

And further, the Supreme Court of the United States in Interstate Commerce Com. v. Louisville & N. R. Co. (1913) 227 US 88, 57 L ed. 431 33 S Ct. 185 states with reference to the argument advanced by the Commission in their order about their rule making power outside the hearing as follows:

"Such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute ***. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. **All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.** In no other way can a party maintain its rights or make its defense. **In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding.**" Emphasis Supplied.

Also, as to sufficiency of evidence, the United States Supreme Court in the case of Consolidated Edison Company v. National Labor Relations Board, 305 U. S. 197, 59, Supreme Court 206, 83 L ed., 126 at page 140 of 83 L. ed. interprets the following language:

"We agree that the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' means supported by substantial evidence. Washington, V. & M., Coach Co. v. National Labor Relations Bd. 301 U. S. 142, 147, 81 L. ed. 965, 970, 57 S. Ct. 648. **Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.** Appalachian Electric Power Co. v. National Labor Relations Bd. (C. C. A. 4th) 93 F. (2d) 985,

989; National Labor Relations Bd. v. Thompson Products (C. C. A. 6th) 97 F. (2d) 13, 15; Ballston-Stillwater Knitting Co. v. National Labor Relations Bd. (C. C. A. 2d) 98 F. (2d) 758, 760. We do not think that the Court of Appeals intended to apply a different test. In saying that the record was not 'wholly barren of evidence' to sustain the finding of discrimination, we think that the court referred to substantial evidence. Ballston-Stillwater Knitting Co. v. National Labor Relations Bd. (C. C. A. 2d) 98 F. (2d) 758, supra.

"The companies urge that the Board received 'remote hearsay' and 'mere rumor.' The statute provides that 'the rules of evidence prevailing in courts of law or equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. Interstate Commerce Commission v. Baird, 194 U. S. 25, 44, 48 L. ed. 860, 869, 24 S. Ct. 563; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 93, 57 L. ed. 431, 434, 33 S. Ct. 185; United States v. Abilene & S. R. Co. 265 U. S. 274, 288, 68 L. ed. 1016, 1022, 44 S. Ct. 565; Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 442, 74 L. ed. 524, 535, 50 S. Ct. 220. **But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence.**" Emphasis Supplied.

Also, speaking of a fairly similar situation, the Supreme Court of Idaho in Application of Citizens Utilities Company, Idaho (1960) 351 Pac. 2d 487 states:

"A hearing at which the applicant is fully advised of the claims of the opposition and of the facts which may be weighed against him, and at which he is given full opportunity to test and refute such claims and such facts, and to present his side of the issues in relation thereto, is essential to due process. Allied Van Lines, Inc. v. Idaho Public Utilities Commission 79 Idaho 220, 312 P. 2d 1050; Philadelphia Co. v. Securities and Exchange Comm. 84 U. S. App. D. C. 73, 175 F. 2d 808; Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773, 999, 82 L. ed. 1129; Consolidated Edison Co. of New York v. N. L. R. B., 305 U. S. 197, 59 S. Ct. 206 83 L. ed. 126.

"The attorney general calls attention to the rule-making power of the commission conferred by I.C. 61-601, and the rule 9.20 of the Rules of Practice and Procedure adopted by the commission:

'9.20 Official Notice. The Commission may take official notice of the following matters:

'(a) Rules, regulations, official reports, decisions and orders of the Commission and any regulatory agency, state or federal.

'(b) Contents of decisions, orders, certificates and permits issued by the Commission.

'(c) Matters of common knowledge and technical or scientific facts of established character.

'(d) Official documents, if pertinent, when properly introduced into the record of formal proceedings by reference; provided, however, that proper and definite reference to such document shall be made by the party offering the same and that the same is published and generally circulated so that an opportunity shall be given to all of the parties of interest at the hearing to examine the same and present rebuttal evidence.'

"Except as to facts referred to in subsection (c), this rule does not purport to authorize findings based on facts not in evidence. **In any event the Commission cannot by rule transcend the constitutional requirement of due process.**" Emphasis Supplied.

Again in Olive Proration Program, Etc. v. Agricultural Prorate Commission et al, California (1941) 109 P. 2d 918 at page 921 as follows:

"The parties were not apprised that this survey was being made or the result of it until after the last order of the commission was promulgated. As a result they were denied all right of cross-examination with respect thereto and also of an opportunity to make a counter showing in rebuttal. Under such circumstances, the statutory requirement of a hearing was not met. Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773, 999, 82 L. ed. 1129; I.C.C. v. Louisville & N.R. Co., 227 U. S. 88, 33 S. Ct. 185, 57 L. ed. 431; see 52 Harv. L. Rev. 509, 12. **Only evidence which the opposite party has an opportunity to refute at the hearing may be relied upon as the basis of a finding.** United States v. Abilene & So. Ry. Co., 265 U. S. 274, 44 S. Ct. 565, 68 L. ed. 1016." Emphasis Supplied.

All these things are eloquently stated by the great Judge Cardozo speaking for the United States Supreme Court in Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio (1937) 301 U. S. 292, 57 S. Ct. 724, 81 L. ed. 1093 at page 1101 as follows:

"What was done by the Commission is subject however, to an objection even deeper. Cf. Brown v. New Jersey, 175 U.S. 172, 174, 175, 44 L. ed. 119-121, 20 S. Ct. 77; West v. Louisiana, 194 U.S. 258, 262, 263, 48 L. ed. 965, 969, 970, 24 S. Ct. 650. There has been more than an expansion of the con-

cept of notoriety beyond reasonable limits. **From the standpoint of due process—the protection of the individual against arbitrary action—deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out.** When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. **The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists,** as if a judge were to tell us, 'I looked at the statistics in the Library of Congress and they teach me thus and so.' **This will never do if hearings and appeals are to be more than empty forms.** ***

"To put the problem more concretely: **How was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?** In expressing that approval the court did not mean that, traveling beyond the record, it had consulted price lists for itself and had reached its own conclusion as to the percentage of decline in value from 1925 onwards. It did not even mean that it had looked at the particular lists made use of by the Commission, for no one knows what they were in any precise or certain way. Nowhere in the opinion is there even the hint of such a search. What the Supreme

Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.' West Ohio Gas Co. v. Public Utilities Commission (No. 1) supra (294 U. S. p. 69, 79 L. ed. 768, 55 S. Ct. 316). Cf. Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 57 L. ed. 431, 33 S. Ct. 185; United States v. Abilene & S. R. Co. 265 U. S. 274, 288, 68 L. ed. 1016, 1022, 44 S. Ct. 565; Chicago Junction Case (Baltimore & O. R. Co. v. United States), 264 U. S. 258, 263-265, 68 L. ed. 667, 673, 674, 44 S. Ct. 317.

"Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. West Ohio Gas Co. v. Public Utilities Commission (No. 1) supra (294 U. S. p. 70, 79 L. ed. 768, 55 S. Ct. 316); West Ohio Gas Co. v. Public Utilities Commission (No. 2), 294 U. S. 79, 79 L. ed. 773, 55 S. Ct. 324; Los Angeles Gas & E. Corp. v. Railroad Commission, 289 U. S. 287, 304, 77 L. ed. 1180, 1191, 53 S. Ct. 637. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73, 80 L. ed. 1033, 1052, 56 S. Ct. 720) of a fair and open hearing be maintained in its integrity. Morgan v. United States, 298 U. S. 468, 480, 481, 80 L. ed. 1288, 1294, 1295, 56 S. Ct. 906; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 S. Ct. 185 supra. The right to such a hearing is one of 'the

rudiments of fair play' (Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, 168, 58 L. ed. 554, 555, 34 S. Ct. 301) **assured to every litigant by the Fourteenth Amendment as a minimal requirement.** West Ohio Gas Co. v. Public Utilities Commission (No. 1), (No. 2), 294 U. S. 63, 79, 79 L. ed. 761, 773, 55 S. Ct. 316, 324, supra; Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 682, 74 L. ed. 1107, 1114, 50 S. Ct. 451, Cf. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 77 L. ed. 796, 53 S. Ct. 350 supra. **There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delaw when that minimal requirement has been neglected or ignored."** Emphasis Supplied.

THEREFOR, from the record made, the examination conducted and under the authorities cited, the order appealed from is SET ASIDE AND REVERSED as being unlawful and not based upon sufficient legal evidence. Counsel for each party to the action are granted ten (10) days from this date to submit proposed Findings of Fact and Conclusions of Law in conformity with this order as provided by Rule 17 of this Court.

DATED this 26 day of April 1963.

By ...../s/.....
Paul G. Hatfield, District Judge

APPENDIX IV

DISTRICT COURT FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

CASCADE COUNTY CONSUMERS ASSOCIATION;
MONTANA CONSUMERS ASSOCIATION;
MONTANA STATE FLORISTS ASSOCIATION;
RALPH PARKER, an Individual;
ARTHUR SMITH, an Individual; and
LLOYD C. WENNER, an Individual,

Plaintiffs and Respondents,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA, PAUL T. SMITH, JACK HOLMES and LOUIS C. BOEDECKER, as members thereof and constituting said PUBLIC SERVICE COMMISSION OF MONTANA; and THE MONTANA POWER COMPANY, a Corporation,

Defendants and Appellants.

FINDINGS OF FACT

1.

The Cascade County Consumers Association, the Montana Consumers Association and the Montana Florists Association are all unincorporated associations composed of residential and business users of natural gas supplied by the defendant Montana Power Company, either directly or indirectly, in various cities within the State of Montana served by the said

Utility, and they were all parties in interest before the Montana Public Service Commission in its Docket No. 4997, and all are dissatisfied with Order No. 2897 in said Docket;

Ralph Parker, Arthur Smith and Lloyd C. Wenner are individual users of natural gas supplied by the Montana Power Company, either directly or indirectly, within the State of Montana and are dissatisfied with Order No. 2897 in Docket No. 4997.

2.

The Montana Power Company is a public utility furnishing natural gas service in the State of Montana, and is subject to the jurisdiction and authority of the Commission and this Court.

3.

The Public Service Commission of Montana is an administrative commission of the State of Montana whose duties include regulation of public utilities, and whose members Paul T. Smith, Jack Holmes and Louis G. Boedecker, at all times material to this cause were, and now are, the duly elected, qualified and acting members thereof.

4.

The Public Service Commission held public hearings on the application of the Montana Power Company for authority to adopt new rates, the first one commencing on May 23, 1961, in the House Chambers of the State Capitol at Helena, Montana, when the Montana Power Company's case in chief was

presented, which hearing was thereafter recessed on May 24, 1961, and reconvened on July 18, 1961, in the Silver Bow County Courthouse at Butte, Montana, to hear cross-examination and evidence of protestants and to consider a cross petition filed by various parties thereto, which proceedings continued for 12 days and until the 2nd day of August, 1961, when the hearing was closed and the matter taken under advisement by the Public Service Commission.

5.

The Public Service Commission issued its Order No. 2897 on February 2, 1962, and its subsequent Order No. 2897A on February 23, 1962, in Docket No. 4997, and subsequently thereto on the 27th day of April, 1962, plaintiffs herein filed an appeal from Order No. 2897 in said Docket.

6.

The transcript of the testimony taken at the public hearings before the Public Service Commission and the exhibits and data sheets taken therein were certified to this Court by the Public Service Commission and are a part of the record before this Court.

7.

On October 4, 1961, at Helena, Montana, officials and experts of the Montana Power Company, together with the Company counsel made an appearance before at least two members of the Public Service Commission, at which time information was given to the Commission members pertaining to the rate

of return on production property located partly in Montana and partly in Canada, which property the Montana Power Company had included as part of its gas rate base claimed in Docket No. 4997. None of the protestants to the said docket who are plaintiffs herein, or their counsel were present at the said meeting or invited or allowed to participate therein and no opportunity was given for them to hear the information given or to cross examine or to argue or to introduce rebuttal evidence.

8.

On October 27, 1961, after the public hearings had been closed and the matter taken under advisement, and after the meeting of October 4, 1961, the Montana Consumers Association, a protestant in Docket No. 4997 and a plaintiff herein, filed a petition with the Commission based on an affidavit alleging the meeting of October 4, 1961, wherein it requested that the Commission suspend all further proceedings in the Docket and that a further hearing be held for the purpose of examining witnesses of the Montana Power Company and to allow the protestants to present additional evidence. This petition was dismissed in Order No. 2897.

9.

No transcript was kept of the proceedings at the said meeting held on October 4, 1961, and no record was certified to this Court as to what took place at said meeting.

10.

The Public Service Commission in valuing gas reserves, made independent investigations, collected information, prepared schedules and reviewed outside source material, which outside information and evidence was used by the Commission in arriving at its values for gas reserves. Docket No. 4997 was never reopened to consider this outside information and evidence in full and fair hearing, and the parties had no opportunity to analyze, cross examine, argue or rebut it, nor was it included in the record before the Commission or this Court.

11.

The valuation of gas reserves has a substantial effect on the rate base. The Public Service Commission rejected the methods proposed by the Montana Power Company for valuation of gas reserves and substituted determinations of value for gas reserves not supported by legal evidence in the record.

12.

The Public Service Commission in valuing gas reserves considered Reproduction Cost New Depreciated. The only evidence of RCND valuation in the record was specifically rejected by the Commission as a basis of value.

13.

The determination by the Public Service Commission of which gas properties are used and useful was based upon information obtained outside the record.

Docket No. 4997 was never reopened to consider this outside information and evidence in full and fair hearing and the parties had no opportunity to analyze, cross examine, argue or rebut it, nor was it included in the record before the Commission or this Court.

CONCLUSION OF LAW

1.

This matter is an appeal to the District Court for review of an Order of the Montana Public Service Commission and was tried to the Court upon the transcript before such Commission and upon further additional evidence presented to the Court and was considered by the Court on the theory that the matter was before the Court to review the evidence presented to the Commission to determine whether on the legal evidence submitted and of record before the Commission, supplemented by other additional evidence of record in this Court, the Commission's rulings were proper and the Order lawful and reasonable.

2.

The procedure of the Commission in holding a private meeting on October 4, 1961, with the Montana Power Company did not meet the basic requirements of a full and fair hearing, and violated the principle of due process of law set forth in both the Montana and United States Constitutions.

3.

The Order of the Public Service Commission in

dismissing the petition to reopen the hearing after the meeting of October 4, 1961, was a denial of due process of law and is a violation of the Fourteenth Amendment of the United States Constitution.

4.

The Public Service Commission is invested with broad powers within the specialized field assigned it by the Legislature. Its informed, openly arrived at and expert judgment, when exercised after full and fair hearing and within constitutional restraints, will not be disturbed by the Courts.

5.

Its special powers and expert judgment in its specialized field gave the Public Service Commission authority to reject the Montana Power Company's methods of valuation of gas reserves but the Commission had no authority in valuing gas reserves to use information and evidence obtained outside the record without a full and fair hearing.

6.

There is no evidence in the record to substantiate the Reproduction Cost New Depreciated valuation placed by the Commission upon gas reserves and used in determining the rate base.

7.

Securing and gathering information and evidence outside the record without a full and fair hearing on such information and evidence amounts to a denial of due process of law and is a violation of the Four-

teenth Amendment of the United States Constitution.

8.

Order No. 2897 of the Public Service Commission is unlawful because it is based on information and purported evidence obtained outside the record and without fair hearing procedures.

9.

Order No. 2897 of the Public Service Commission is unlawful because it is based on insufficient legal evidence.

10.

The record in this case is insufficient for the Commission to determine whether or not the Montana Power Company is receiving a fair return upon a fair value for its properties, and information and evidence obtained outside the record without a full and fair hearing does not provide a lawful basis for such a determination.

DATED this 3rd day of June, 1963.

PAUL G. HATFIELD
District Judge

JUDGMENT

The issues in the above-entitled action having been regularly brought on for trial before the Honorable Paul G. Hatfield without a jury, the parties having appeared by their respective counsel, and the issues having been duly tried and the Court having considered the pleadings, the record of hearings, testimony before the Court, briefs of counsel, and oral

argument, and the Court having filed its opinion on the 26th day of April, 1963, and the Court on the 3rd day of June, 1963, having filed its Finding of Fact and Conclusions of Law, directing Judgment as hereinafter provided,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED,

I.

That Judgment is hereby entered in favor of the Plaintiffs, and each of them, and against the Defendants, and each of them.

II.

That Order No. 2897 of Docket No. 4997 including further rates and charges set forth in Order No. 2897A of Docket No. 4997, all issued by the Public Service Commission of the State of Montana on February 2, 1962, are set aside and reversed as being unlawful and not based upon sufficient legal evidence for the reason set forth in the memorandum opinion of this Court filed April 26, 1963, in this cause.

III.

That the rates and charges as set forth in Order No. 2897 of Docket No. 4997 including further rates and charges set forth in Order No. 2897A of Docket No. 4997, all issued by the Public Service Commission of the State of Montana on February 2, 1962, are hereby vacated, set aside and declared unlawful and that the said Order Nos. 2897 and 2897A are hereby declared void and of no force and effect.

IV.

That this Judgment and Order shall apply to the rights of the parties to this action or to this action itself as distinguished from the rights of the parties to Cause No. 6143 in the District Court of the Twelfth Judicial District of the State of Montana in and for the County of Blaine.

V.

That the Clerk is directed to mail a true copy of this Judgment to the attorneys for the respective parties and make due return herein.

DATED this 3rd day of June, 1963.

PAUL G. HATFIELD
District Judge

APPENDIX V

MOTION TO REOPEN AND AFFIDAVITS

Court and Cause

MOTION TO REOPEN

COMES NOW, the MONTANA CONSUMER'S ASSOCIATION, a Protestant in the above-entitled mater, Docket No. 4997, and petitions, moves and requests of the Montana Public Service Commission that the above-entitled matter be reopened for further public hearing and that all proceedings herein be continued until further Order of the Commission.

That this motion and Petition is made on the file, records and transcript herein and the Affidavits hereto attached and specifically on the grounds and for the reasons as hereinafter set forth, to-wit:

1. That this petitioner is informed and believes and on such information and belief alleges that on or about Wednesday, October 4, 1961, the Montana Power Company, the applicant in the said Docket No. 4997, appeared before at least two (2) members of the Public Service Commission of the State of Montana, informally with one or more counsel and two or more expert witnesses and gave and presented to said members certain information pertaining to the rate of return on the production property said company had including in said Docket as a part of the Gas Rate Base in said Docket which production property is located partly in Montana and partly in Canada, and at said time and place of said informal meeting no protestants were present to hear said in-

formation nor were Protestants given an opportunity to hear the same or cross-examine in connection therewith or to introduce evidence in rebuttal thereof.

2. That the transcript in this proceedings and evidence and exhibits and figures furnished by the applicant herein concludes or gives the impression that applicant is making a rate of return on the value of its Montana production properties which it has included in this application, of approximately nine (9) percent while it made a rate of return on its production properties in Canada included in the proceedings of approximately three (3) percent and Petitioner movant herein is informed and believes and therefore alleges that said applicant, Montana Power, did, at said unofficial meeting of October 4, 1961, give information to said two (2) members of said Commission to the general effect that it, the Montana Power, had made an error or some miscalculation in its Canadian Income Tax returns and that some grave question arose as to what it should be paying in taxes and royalties in the Province of Alberta, Canada and that public testimony thereon would be detrimental to the gas rate payers of the State of Montana and the United States Treasury.

3. That this Protestant is informed and believes and therefore alleges that the Montana Power Company has not made any error in the income tax returns or royalties payments in Canada, but that the Montana Power Company listed in this proceedings, as a part of its rate base on which it is requesting

the Montana gas users to pay it a rate of return, some Seven Million Dollars ($7,000,000.00) on leases which are not used and useful in its gas operations, all of which are located in Alberta and the Province of Alberta, Canada and has included in its rate base some Three Million Dollars ($3,000,000.00) of interest as a part of the purchase price of certain of its Canadian properties which it has listed in its rate base, all of which amounts to approximately Ten Million Dollars ($10,000,000.00), none of which is a proper part of the gas rate base, and should be excluded from any properties used in determining the ratio of investment in Canada and the United States for the allocation of income tax payable on the total business as between said taxing units, namely the Province of Alberta, Canada and the United States of America. That the Montana Power is not required to include the same in any such allocation and need not pay taxes to Canada based on any such valuation as it has included as a rate base in this proceedings and that if said approximate Ten Million Dollars ($10,000,000.00) is deducted from said Canadian properties it will appear that Canada is being paid a fair allocation of the income from said gas operations and that said return on Canadian production property minus this Ten Million Dollars ($10,000,000.00) would be in a sum of approximately six to seven and one-half (6-7½%) per cent rather than the approximate Three (3%) per cent as shown by the figures submitted and data sheets 34 and 35. Thus Canada is actually

being paid its fair share of taxes, but the Montana Power is requesting the Montana rate payer to pay a return on property which is not included or includible in the rate base in this matter and is not being recognized in Canada as a part of the production property of the Montana Power's gas facilities.

4. That this Protestant and movant is informed and believes and therefore alleges that if this matter is opened to hearing and subjected to cross-examination and rebuttal evidence that Protestants position stated herein will be substantiated.

WHEREFORE Petitioner prays that this Commission make and give its Order suspending all proceedings herein until after this Docket is reopened and a Public hearing is held and it be further Ordered that at said time Protestants have an opportunity to hear and cross-examine Montana Power witnesses on this matter and to produce such proper evidence as Protestants may desire.

Respectfully moved and submitted,

MONTANA CONSUMERS ASSOCIATION
By

P. J. Gilfeather /s/
Leo Graybill, Jr. /s/
C. W. Leaphart, Jr. /s/

Court and Cause

SUPPORTING AFFIDAVITS

STATE OF MONTANA)
) ss.
County of Cascade)

Leo Graybill, Jr., being first duly sworn on oath deposes and says:

That he is one of the Counsel for Montana Consumer's Association and certain other protestants in the above entitled Docket; that he is informed and believes and therefore alleges that at a meeting held on Wednesday, October 4, 1961, in the offices of the Montana Public Service Commission, Counsel for the Montana Power Company together with the Treasurer of the said Company and at least one other witness gave information and evidence to at least two of the Commissioners, then present, concerning certain evidence introduced in the hearing on the above Docket held in Butte during July and August; that the information and evidence which the said witnesses gave concerned the inter-relationship on a nine (9) percent rate of return on certain Montana production properties with a two (2) to three (3) per cent rate of return on certain Canadian properties;

That the Montana Power Company had ample opportunity to present such evidence at the hearing above referred to, but chose not to present it publicly when the right of cross-examination and rebuttal was available to protestants.

Leo Graybill, Jr. /s/

SUBSCRIBED AND SWORN to before me on this 23rd day of October, A.D., 1961.

Truman G. Bradford /s/
Notary Public for the State of Montana
Residing at Great Falls, Montana
My Commission expires Jan. 15, 1964.

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

C. W. LEAPHART, JR. being duly sworn upon his oath deposes and says:

That he is one of the counsel for the Montana Consumer's Association and certain other protestants, including himself as an individual, in the above-entitled Docket;

That he knows of his own knowledge that a meeting was held in the offices of the Montana Public Service Commission on Wednesday, October 4, 1961, wherein counsel for The Montana Power Company, together with the treasurer of said company and other witnesses gave information and evidence to a majority of the members of the Public Service Commission then present;

That he is informed and believes and therefore alleges that the evidence discussed concerned the percentage return sought on the production facilities of the Montana Power Company, both in the United States and in Canada, and the effect upon the income taxes resulting therefrom;

That at no time during the proceedings of the public hearing were the protestants given full and complete information concerning the said income tax returns of the Montana Power Company.

That none of the protestants were requested to attend said meeting, nor did they have the right to interrogate or cross examine the witnesses concerning the particular evidence given at this meeting.

C. W. Leaphart, Jr. /s/

SUBSCRIBED AND SWORN to before me this 26th day of October, 1961.

Phyllis J. Yalovich /s/
Notary Public for the State of Montana
Residing at Helena, Montana
My commission expires Oct. 7, 1964.

APPENDIX VI

ISSUES OF FACT AND LAW FROM PRE-TRIAL ORDER IN DISTRICT COURT

ISSUES OF FACT

The following issues of fact are presented by the case:

1. Concerning the meeting of October 4, 1961, were matters of explanation and evidence, if any, presented to the Commission without opportunity for cross-examination and rebuttal?

2. Are there in fact income tax deductions claimed by The Montana Power Company in its income tax returns which are not reflected in the exhibits presented to the Public Service Commission, and which would tend to lessen the expenses claimed therein by The Montana Power Company?

3. Are gas reserves included in production plant claimed as part of the rate base by The Montana Power Company and Public Service Commission which are not presently used and useful to consumers?

4. Is natural gas in suitable quantities available to The Montana Power Company at prices substantially less than those asked in the Alberta and Southern Contract and covered by the rate increase granted by the Commission?

ISSUES AT LAW

1. May the Public Service Commission hear explanations and evidence, if any, at a meeting with

The Montana Power Company personnel without consent or permission of Plaintiffs or opposing groups?

2. Did the Public Service Commission correctly rule that The Montana Power Company's income tax return for 1960 need not be produced for examination by protestants in the hearing before the Commission?

3. Is The Power Company's income tax return for 1960 admissible before the Trial Court, or can Plaintiffs herein require its production for study?

4. Can gas reserves contained in leases be properly included in the rate base and particularly leases upon which no royalty is being paid?

5. Should gas in place be valued for rate-making purposes, and if so how should such value be determined?

6. Does the Public Service Commission have to take into consideration as a basis for setting rates the cost of gas shown by the Alberta and Southern gas contract entered into by The Montana Power Company if other adequate sources of gas at cheaper prices are available?

7. In computing the original cost of company property, must the property be valued at its cost to the company which first puts the property to public use?

8. In determining rates should the cost of capital rate be applied to the fair value of property, or to the invested capital of the company?

9. Is the rate structure applicable to the Ellison Lime Company discriminatory when compared with

other manufacturing companies operating under similar conditions?

10. Has the Public Service Commission ignored evidence presented by protestants before the Commission of reasonable methods for phasing in newly purchased Canadian gas?

DATED this 27th day of July, 1962.

Paul G. Hatfield /s/
Judge

APPROVED AS TO FORM AND CONTENT:
Plaintiffs by
P. J. Gilfeather /s/
Public Service Commission by
William P. Mufich /s/
The Montana Power Company by
William H. Coldiron /s/
Filed July 27, 1962.

CORRECTED COPY

Office-Supreme Court, U.S.
FILED
JAN 2 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 738

CASCADE COUNTY CONSUMERS ASSOCIATION, ET AL., *Petitioners*,

v.

PUBLIC SERVICE COMMISSION OF MONTANA, ET AL., *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 738

CASCADE COUNTY CONSUMERS ASSOCIATION; MONTANA CONSUMER ASSOCIATION; MONTANA STATE FLORISTS ASSOCIATION; RALPH PARKER, AN INDIVIDUAL; ARTHUR SMITH, AN INDIVIDUAL; AND LLOYD C. WENNER, AN INDIVIDUAL, *Petitioners*,

v.

PUBLIC SERVICE COMMISSION OF MONTANA; PAUL T. SMITH, JACK HOLMES AND LOUIS G. BOEDECKER, AS MEMBERS THEREOF AND CONSTITUTING SAID PUBLIC SERVICE COMMISSION OF MONTANA; AND THE MONTANA POWER COMPANY, A CORPORATION, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

Petitioners fail to print the opinion of the Montana Public Service Commission (Order No. 2897) and state that it is unreported. The Commission opinion is reported in

Volume 42, Public Utilities Reports, Third Series, at page 241. An extensive quotation therefrom appears in the Montana Supreme Court decision in Appendix I to Petition at pages 55-64.

Petitioners do not mention an important supplemental order (No. 2897-B) issued by the Commission in this case. In that order, the Commission affirmed its initial decision after reconsideration of additional evidence that was presented in the District Court. This order, as well as another supplemental order (No. 2897-A) in which the Commission denied petitioners' petition for rehearing, are set forth in the Appendix to this Brief in Opposition at pages i-vii.

Questions Presented

1. Whether parties opposing a gas rate increase requested by a gas company are deprived of property without due process of law because of an *ex parte* discussion between representatives of the State Public Service Commission and representatives of the company where, under applicable State law, those parties were thereafter afforded a hearing in State District Court at which they had unlimited opportunity to ascertain what had occurred at the meeting, where they did not take advantage of that opportunity and did not establish that they had been prejudiced in any way, and where under applicable State law the State District Court was required to and did remand the case to the Public Service Commission for reconsideration in light of any evidence introduced at the District Court hearing.

2. Whether parties opposing a gas rate increase requested by a gas company are deprived of property without due process of law because of alleged reliance by the Public Service Commission upon information gathered through an independent audit by Commission representatives of the company's records where the same District

Court hearing and remand procedures described in the preceding question were followed, where again the parties failed to establish prejudice, and where in addition the audit was made at the request of those parties.

3. Whether parties opposing a gas rate increase requested by a gas company are deprived of due process of law by virtue of the alleged inclusion in the rate base of property not "used and useful," where the Public Service Commission found that all property included in the rate base was in fact "used and useful," where such a finding was required by applicable State law, and where the State Supreme Court held that the Commission's finding was supported by the record.

Statutes Involved

The petition is defective in not including various of the Montana statutory provisions governing the action of the Montana Public Service Commission in rate proceedings. For the convenience of the Court, respondents have reproduced a number of these provisions in the Appendix to this Brief in Opposition at pages vii-xii. Particularly important is the section establishing the procedure for reviewing rate orders of the Commission, 4 Rev. Codes Mont. 1947, § 70-128.

Statement

The Public Service Commission of Montana (hereinafter sometimes referred to as the "Commission"), the individual members thereof, and The Montana Power Company (hereinafter sometimes referred to as the "Company") have joined in this response. Throughout this Brief in Opposition all of these parties will be referred to jointly as respondents unless separate designation is necessary.

Since petitioners' statement of the case omits for the

most part the facts regarded as controlling by the Supreme Court of Montana, respondents feel obliged to restate in full the nature of this case.

At issue is a gas rate order that was entered by the Public Service Commission after the most exhaustive consideration. As the Montana Supreme Court observed, some 2900 pages of testimony were taken, and "[t]he entire fiscal, production, transmission and policy operations [of the Company] were explored by all interested parties at the Board hearings" (Pet. App. I, p. 24). The result was the approval by the Commission of a rate increase. Petitioners seek review on three grounds of the judgment of the Montana Supreme Court sustaining this Commission order.

1. *The October 4 Meeting.* The first ground relates to a discussion between two members of the Commission and four representatives of the Company on October 4, 1961, shortly after the close of the hearing. On October 27, 1961, petitioners filed a motion asking the Commission to reopen the proceedings because of that meeting. On February 2, 1962, in the same order that established the Company's rates, the Commission denied petitioners' motion (Tr. App. A, pp. 14-17).[1]

For present purposes, the most critical events occurred during the State District Court proceedings upon petitioners' complaint seeking to set aside the Commission's order. Under the relevant statutory provision, 4 Rev. Codes Mont. 1947, § 70-128 (App. p. x, *infra*), the party contesting the Commission's order may introduce before the District Court additional evidence, and if that is done the

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[1] In this brief, we shall refer to the transcript of the court hearings as "Tr." and to the Commission hearing transcript as "P.S.C. Vol. —, p. —."

District Court is required to remand the case to the Commission for reconsideration.

In the case at bar, one of the issues raised in the District Court by petitioners related to the October 4 conference (Pet. App. I, p. 44). At the pre-trial conference petitioners stated that they expected to call as witnesses all of the members of the Commission and the four Company representatives who had attended the conference (Tr. pp. 43, 44). In consequence, when the matter came on for trial everyone who had been present at the conference was in the courtroom prepared to testify (Pet. App. I, p. 45).

Despite this opportunity to establish that they had been prejudiced by the October 4 meeting, petitioners' efforts were, to put it conservatively, desultory. Indeed, the task of establishing the facts respecting the meeting fell by default to the Company's attorneys, as is made plain in the Supreme Court's opinion (Pet. App. I, pp. 45-47).

Thus, while Commissioner Smith stated on direct examination by petitioners' counsel that the meeting had been called at the initiative of the Commission because he and another Commissioner wanted clarification respecting a certain question, counsel did not even ask what that question was (Tr. 103). It was not until cross-examination, as the Supreme Court observed, that any details of the meeting emerged (Pet. App. I, p. 46). In response to interrogation by the Company's attorney, Commissioner Smith stated that the discussion at the meeting had related to "some questions about the income tax as it applied in Canada and in the United States" and that his decision would have been the same if there had not been any meeting (Tr. 119, 122; Sup. Ct. Op., Pet. App. I, p. 46). There was no redirect examination.

The few broad questions asked of Commissioner Smith

ended petitioners' inquiry respecting the October 4 meeting. Petitioners' attorneys interrogated Commissioner Boedecker and the Company's treasurer, Mr. Harrington, about other matters, but did not ask them a single question concerning the meeting. Nor did petitioners call any of the other participants in the meeting.

The Company's counsel, however, noting that petitioners' counsel had not dealt with this issue when Boedecker and Harrington were on the stand, recalled them and explored the matter (Tr. 133, 157, 187, 190). Both testified that the discussion had concerned differences between the tax structure of Canada and the United States; Harrington restated in detail what he had told the Commissioners as to why a suggested change in tax treatment of certain properties of the Company would result in no benefit whatever to the Company's customers; and Boedecker stated that the meeting did not change his decision (Tr. 187, 188, 192; see Supreme Court discussion at Pet. App. I, pp. 46-47).

With this additional evidence introduced, the District Court remanded the case to the Commission for its reconsideration in accord with the statutory provisions described above. The Commission, having "carefully reviewed and considered" the testimony, reaffirmed its rate order (App. pp. i-iii).

While upon subsequent review the District Court reversed the Commission, in part because of the October 4 meeting (Pet. App. II, pp. 104-112), the Supreme Court disagreed. Notwithstanding its view that the Commission should abstain from this type of *ex parte* meeting (Pet. App. I, pp. 39-44), the Court held that there had been no deprivation of due process in view of the opportunity

accorded petitioners in the District Court hearing to establish prejudice and their failure to do so (*id.*, at p. 47).[2]

2. *The Closing Audit.* The second issue raised by petitioners relates to an audit and investigation performed by Commission representatives after the hearings. This audit was made, as the Supreme Court pointed out, in response to a motion by petitioners (Pet. App. I, p. 30; PSC Vol. XXXI, p. 2921). No motion for reopening on account of this audit was made to the Commission by petitioners; but at the District Court hearing petitioners claimed that the audit had deprived them of due process.

Again, evidence was taken in the District Court respecting this question. Commissioner Smith testified that the Commission had directed its auditor and its attorney to examine the Company's books; that the auditor and attorney reported to the Commission that the facts introduced by the Company were verified by the audit; that all adjustments by the Commission of Company figures were based upon data presented at the hearings; and that petitioners' counsel would have to ask the auditor, Mr. Johnson, for more particular information (Tr. 105, 109, 116, 117).

Commissioner Boedecker testified that the audit had been made pursuant to petitioners' motion; that the audit had included a study of oil and gas leases; and that the auditor, Mr. Johnson, would be best qualified to testify

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[2] Actually two District Court suits were instituted attacking the Commission order, one by petitioners in Cascade County and another by other protestants in Blaine County. The Blaine County suit ended in a judgment affirming the Commission's decision, and no appeal was taken (Pet. App. I, p. 34). It may be noted that, as the Supreme Court observed, the parties in the Blaine County action stipulated that the court could consider the evidence that had been introduced in the Cascade County suit (*ibid.*).

respecting the records kept of the audit (Tr. 134, 135, 138, 155).

Petitioners introduced no evidence countering this testimony, nor did they call either Mr. Johnson, the Commission's auditor, or Mr. Mufich, its attorney, to testify respecting the audit, although both were in the courtroom pursuant to the District Court's pre-trial order (Pet. App. I, pp. 45, 53).

This additional evidence was considered by the Commission on remand from the District Court together with the evidence relating to the October 4 meeting. As we have noted, the Commission reaffirmed its order; the District Court reversed; but the Supreme Court sustained the Commission. As to this particular issue, the Supreme Court rested its decision upon a number of considerations, including the following: (1) The audit had been requested by petitioners. (2) Petitioners had failed to take advantage of the opportunity given them during the District Court trial to elicit testimony respecting the audit. (3) The Commission had given petitioners ample opportunity during the hearing to examine the Company's books. And (4) "[a] careful examination of this voluminous record fails to substantiate . . . that concerning the post-hearing audits by Commission employees, that the Commission based its judgment upon evidence or information not in the record." (Pet. App. I, pp. 45, 50-53).

3. *The Rate Base.* The final question raised by petitioners is whether they have been deprived of due process because the Commission included in the Company's rate base property not "used and useful." It does not seem necessary to relate the extensive evidence respecting this issue that was considered by the Commission. We are content to rest upon the indisputable facts that State law requires that only property "used and useful" be included

in the rate base (4 Rev. Codes Mont. 1947, § 70-106; Pet. App. I, p. 64); that the Commission applied this standard in this case (Tr. App. A, p. 57; Pet. App. I, pp. 65, 67); and that the Supreme Court held that the Commission had given "very careful attention . . . to the problem of rate base," that it had "determined just what gas leaseholds and gas reserves were used and useful as required by our statute," that "complete, detailed information in the form of testimony and exhibits was introduced," and that "[c]ertainly . . . the Commission could, as it did, exercise its discretion in placing its valuation on gas reserves that are actually used and useful for the convenience of the public" (Pet. App. I, pp. 64-65).

Argument

The grounds put forward by petitioners are wholly insufficient to warrant the grant of *certiorari* both because the decision below accords with prior decisions of this Court and also because that decision has no significance beyond this single case. We discuss in turn the three issues raised by petitioners.

1. The decision below that the Commission's order could not be impeached on the the basis of the October 4 meeting was entirely sound. As this Court has held, in a case like the one at bar there is no violation of the Due Process Clause of the Fourteenth Amendment where the complaining party has not been prejudiced by the acts in question. To put it differently, the asserted want of due process must have resulted in a "deprivation of property" before relief can be had.

Thus, in *Market Street Railway Co.* v. *Railroad Comm'n of California*, 324 U.S. 548, 562 (1945), where the complaint was directed against the action of the State Commission in having based its decision in part upon reports filed with

it after the close of the hearing, this Court held that there had not been a violation of the Fourteenth Amendment because there had been no prejudice. And again, in *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 530 (1946), in similar circumstances this Court held that "the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result."

It was this principle that the Supreme Court of Montana applied in disposing of petitioners' contention, as we have noted. See *supra*, pp. 6-7. Petitioners were given an unlimited opportunity at the District Court trial to establish that they had been damaged by the October 4 meeting, but they did not even attempt to show that the meeting had any bearing whatever on the outcome of the case or that Mr. Harrington's testimony in the District Court respecting the matter of Canadian and United States tax law was in any degree inaccurate. Certainly the hearing in the District Court with the subsequent remand to the Commission fully met the requirements of the Due Process Clause. That petitioners made no effort to establish prejudice simply underscores the inconsequential character of the October 4 discussion.

These circumstances wholly distinguish the decision so heavily relied upon by petitioners, *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n*, 301 U.S. 292 (1937). There, as the Court observed, "the sole method of review [was] by petition in error to the Supreme Court of the State, which considers both the law and the facts upon the record made below, and not upon new evidence." Thus, the Court stressed that "under the statutes of Ohio no provision is made for a review of the order of the Commission by a separate or independent suit" and that a different question would be presented if such a suit could be maintained.

Id., at 303. In the case at bar it is the principle of cases like *Market Street Railway Co.* and *Pierce Auto Freight Lines* that is controlling, not *Ohio Bell Telephone.*[3]

The petitioners' suggestion (Pet. p. 16) that the District Court trial was not adequate because there had been no record of the October 4 meeting, because the ten months' lapse of time "would dull the witnesses' memory," and because the "decision-making process of the Commission [was] complete[d]" is without substance. First, as we have pointed out, under the State statute the decision-making process of the Commission had not ended, but rather the case was reconsidered by the Commission on the basis of the evidence introduced at the District Court hearing. Second, there was no showing whatever that the witnesses' recollection might have been faulty. And finally the petitioners' argument would apply to any remand procedure designed to permit the introduction of new evidence by a party, whereas it is of course incontrovertible that such a procedure is the appropriate remedy in many situations. See, *e.g.*, *Consolidated Edison Co. of New York, Inc.* v. *N.L.R.B.*, 305 U.S. 197, 225-226 (1938), where the Court held that a trial examiner's "arbitrary" refusal to receive certain "highly important" testimony did not result in a deprivation of due process because on appeal from the Board's final decision the petitioners could have secured a court order directing that the evidence be taken. Having failed to avail themselves of this remedy, petitioners could not complain. See also *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126 (1941), where, in rejecting a claim that petitioner had been entitled to a hearing before a committee estab-

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[3] We may note also that extensive research has not disclosed a single court decision involving a statute comparable to 4 Rev. Codes Mont. 1947, § 70-128.

lished to advise the Wage and Hour Administrator respecting minimum wages, the Court stated:

> "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. The proceedings [including a hearing] before the Administrator as provided by § 8(d) satisfy the requirements of due process without further requirement, which the statute omits, of a hearing on notice before the Committee." *Id.*, at 152-153.

See also *Davidson* v. *New Orleans*, 96 U.S. 97, 105 (1877); *Hetrick* v. *Village of Lindsey*, 265 U.S. 384, 387 (1924); *Mount St. Mary's Cemetery* v. *Mullins*, 248 U.S. 501, 506 (1919).

It may finally be noted that the Montana Supreme Court did not stop with its finding that petitioners had in no way been prejudiced by the meeting of October 4. It went on to condemn such *ex parte* meetings as a norm of future conduct. It is, accordingly, unlikely that a case like the one at bar will arise again. We have, then, an entirely correct ruling that the petitioners were in no way prejudiced, along with a sound proscription of such informal practice in the future. It is evident, therefore, that this decision presents no issue of general or continuing significance and does not deserve further review by this Court.

2. The second contention urged by petitioners—that they were deprived of due process by virtue of the independent audit conducted by the Commission—falls on the same grounds discussed above. Again, the petitioners had every opportunity to explore this matter at the District Court trial, but they failed to establish that they had been dam-

aged in any respect by the audit. In fact, as the Montana Supreme Court stressed (Pet. App. I, pp. 45, 53), they did not even call as witnesses the two Commission representatives who conducted the audit, although they were at the hearing prepared to testify. In such circumstances, surely there is no constitutional infirmity in the judgment below.

Indeed, as to this question petitioners expressly disavow any contention that the Commission had no right to conduct the audit (Pet. p. 17). They hardly could take a different position, since the audit was made in response to their motion. Rather, again they contend that the District Court hearing ten months after the audit took place did not provide them with a sufficient opportunity to explore the matter. For the reasons stated above in connection with a similar contention respecting the October 4 meeting, this argument is without force. The notion that only a hearing at the time of the audit could afford petitioners due process simply has no foundation either in common sense, in any decisions that we have discovered, or in any that petitioners have cited.

3. Finally, petitioners maintain that they were deprived of due process because the Commission included property "not used and useful" in the Company's rate base. The short answer is that, as we have indicated (*supra*, p. 9), the Commission held that all the property included in the rate base *was* used and useful within the meaning of the state statute and this finding was affirmed by the Montana Supreme Court. Thus petitioners are urging this Court to sit as a third court of review respecting findings of fact by a state regulatory commission.[4] We respectfully sug-

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[4] In such circumstances, the decision relied upon by petitioners, *Columbus Gas & Fuel Company* v. *Public Utilities Comm'n of Ohio*, 292 U.S. 398 (1934), plainly gives them no support. Indeed, to the extent that decision is relevant, it supports the judgment below. As the Court ob-

gest that, as a basis for granting *certiorari*, this request is frivolous.[5]

Respectfully submitted,

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served in *Columbus Gas*, the question of what property to include in a rate base "within the margin of a fair discretion must be determined for every producer by the triers of the facts in the light of all the circumstances." *Id.*, at 406. That is precisely what the Commission did in the case at bar, with, as the Supreme Court of Montana held, ample support in the evidence (Pet. App. I, p. 67).

[5] To the extent that petitioners relate this argument to the contention respecting the alleged reliance by the Commission on data secured through the independent audit, the argument is, of course, dealt with in the preceding section of this Brief in Opposition.

APPENDIX

BEFORE THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, EX-OFFICIO PUBLIC SERVICE COMMISSION

* * * * * * *

DOCKET NO. 4997

SUPPLEMENTAL ORDER NO. 2897-B

IN THE MATTER of the application of the Montana Power Company for authority to adopt new rates and charges for natural gas service.

* * * * * * *

Affirming Order No. 2897 and Order No. 2897-A

* * * * * * *

On February 2, 1962, the Commission issued Order No. 2897 and thereafter Order No. 2897-A in Docket No. 4997, wherein the Commission authorized The Montana Power Company to increase its rates and charges for natural gas service in Montana. Thereafter, on or about April 27, 1962, Cascade County Consumers Association, Montana Consumers Association, Montana State Florists Association, Ralph Parker, an individual, Arthur Smith, an individual, and Lloyd C. Werner, an individual, appealed Order No. 2897 to the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, under the provisions of Section 70-128, R.C.M. 1947.

The cause came on for trial before the Court on August 15, 1962, at which time Paul T. Smith, J. J. Harrington, Louis G. Boedecker, and L. S. Stadler were called as witnesses and testified. The trial was then recessed until September 5, 1962, at which time J. J. Harrington was called as a witness and gave additional testimony. In addition to the testimony presented, exhibits were received by the Court during the trial. After the testimony was closed, oral argument was presented and the Court, by its Order

dated September 6, 1962, ordered that the testimony of the proceedings before it be transcribed, that the case be remanded to the Commission with the evidence presented to the Court, and that the Commission report its action thereon to the Court within ten days after the receipt of such evidence. The evidence presented to the District Court of Cascade County in Cause No. 55117B on August 15, 1962 and September 5, 1962, including the exhibits, was received from the Clerk of the District Court on October 2, 1962.

The Commission has carefully reviewed and considered the evidence presented to the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, on August 15, 1962 and on September 5, 1962, and as such evidence relates to the evidence presented before the Commission in Docket No. 4997, as remanded to the Commission by the Court in Cause No. 55117B, and the Commission finds that its Order No. 2897 and Order No. 2897-A in Docket No. 4997, should be affirmed in all respects.

Now Therefore, at a session of the Board of Railroad Commissioners of the State of Montana, Ex-Officio Public Service Commission, held in its office in the Capitol, Helena, Montana, on October 10, 1962, there being present Chairman Jack Holmes, Commissioner Paul T. Smith and Commissioner Louis G. Boedecker, there came on regularly before the Commission for final action, the review and consideration of the evidence presented to the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, in Cause No. 55117B, in accordance with said Court's Order under Section 70-128, Revised Codes of Montana, 1947, remanding such evidence to the Commission on October 2, 1962, and the Commission being fully advised in the premises;

It Is Ordered that the Commission's Order No. 2897 and Order No. 2897-A, dated February 2, 1962 and February 23, 1962, respectively, are hereby ratified and affirmed, and

It Is Further Ordered that a full, true and correct duplicate original of this Supplemental Order No. 2897-B be sent forthwith to the Clerk of the District Court of the State of Montana, in and for the County of Cascade, and

that this Supplemental Order shall be considered a report to the Court of the actions and findings of this Commission.

DONE in open session at Helena, Montana, this 10th day of October, 1962.

/s/ JACK HOLMES,
Chairman.

/s/ PAUL T. SMITH,
Commissioner.

/s/ LOUIS G. BOEDECKER,
Commissioner.

ATTEST:

/s/ CATHERINE DUBOIS,
Secretary

Filed October 11, 1962.

* * * * * * *

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MONTANA

* * * * * * *

DOCKET NO. 4997

ORDER NO. 2897-A

IN THE MATTER of the application of THE MONTANA POWER COMPANY for authority to adopt new rates and charges for natural gas service.

* * * * * * *

BE IT REMEMBERED, that the Commission on February 2, 1962, made and entered Order No. 2897 in the above-entitled Docket. On February 13, 1962, the Great Falls Gas Company, one of the protestants herein, filed with the Commission a MOTION TO RECONSIDER AND APPLICATION FOR REOPENING OF HEARING. On February 14, 1962, the Administrator of General Services, on behalf of the United States Government, filed a PETITION FOR LATE FILING AND MOTION TO RECONCIDER AND IN THE ALTERNATIVE APPLICATION FOR REOPENING OF HEARING. On February 16, 1962, the protestants, Montana Consumers Association, Hi-Line Consumers Association, Lewis and Clark County Consumers Association, Cascade County Consumers Association, Montana Florist Association, Elliston Lime Company and C. W. Leaphart, Jr. as an individual, filed a PETITION FOR REHEARING.

The Commission would like to point out that the PETITION FOR REHEARING filed by the Montana Consumers Association, et al, and the MOTION FOR RECONSIDERATION AND IN THE ALTERNATIVE APPLICATION FOR REOPENING OF HEARING filed by the Administrator of General Services were not filed within the time required by the rules and regulations of the Commission. However, because of the serious nature of this proceeding, the Commission accepts the filing of these documents and will pass on the merits of the issues raised therein.

The Great Falls Gas Company in its motion and application raised certain questions as to the form of rate sched-

ule provided for in Order No. 2897 for the sale of gas by The Montana Power Company to the Great Falls Gas Company and to certain provisions therein contained. The General Services Administrator in his motion and application raised substantially the same questions as to the form of the rate schedule provided for the Great Falls Gas Company as were raised by the Great Falls Gas Company in its motion and application. The PETITION FOR REHEARING filed by Montana Consumers Association raises certain questions as to the rate schedules provided for general customers of the applicant Montana Power Company, to evidence which the Commission allegedly did not consider in connection with Order No. 2897 and to certain rulings made by the Commission during the course of the hearings held in the above-entitled Docket.

The Commission has carefully considered each of the issues raised by the motions, applications and petitions filed by the Great Falls Gas Company, the Administrator of General Services and the Montana Consumers Association. These issues have been considered in the light of all of the evidence introduced by all of the parties in the above-mentioned Docket and further consideration of the briefs filed by the various parties of this Docket.

After such consideration of these issues and reconsideration of all of the evidence introduced in the above-entitled Docket and of the briefs filed by the various parties herein, the Commission has determined that the rate schedule for the Great Falls Gas Company provided on Pages 64 and 65 of Order No. 2897 should be modified and amended as hereinafter provided.

IT IS HEREBY ORDERED that the following language appearing on pages 64 and 65 of said Order, namely

"First 10 days' use of monthly Maximum demand	@	$ .50 per MCF
Next 100,000 MCF per month	@	.45 per MCF
Next 100,000 MCF per month	@	.33 per MCF
All additional gas per month	@	.31 per MCF

The Seller shall not be required to furnish gas to the Buyer for service to any new customer or for new or additional service to an existing customer, which will use or require gas in excess of 5,000 MCF per month unless Seller shall agree in writing to furnish gas for such service."

be stricken and there shall be substituted therefor the following language:

"Monthly demand charge—$2.50 per month per customer served by Great Falls Gas Company

Monthly commodity charge—$0.33 per MCF

A customer is defined as an account where a minimum or larger bill is due for service during the previous month but does not include locked off meters even though physically connected to distribution mains.

The Seller shall not be required to furnish gas to the Buyer for service to any new customer or for new or additional service to an existing customer, which will use or require gas in excess of 5,000 MCF per month unless Buyer has secured prior written approval for such service from the Montana Public Service Commission."

The Commission has determined that the rate schedule set forth above will produce the same amount of revenue for The Montana Power Company as would have been produced by the rate schedule originally provided in Order No. 2897. Only the form of the rate schedule has been modified.

IT IS FURTHER ORDERED that the above rate schedule shall apply on all gas delivered by The Montana Power Company to the Great Falls Gas Company on or after March 1, 1962.

After considering all of the motions, applications and petitions aforesaid and after reconsidering all of the evidence introduced by all parties at the hearings held in this Docket and the briefs of the parties heretofore filed herein, the Commission reaffirms all that is stated, provided and ordered in Order No. 2897, except the rate

schedule for the Great Falls Gas Company which is modified as hereinabove provided.

IT IS FURTHER ORDERED that the motions, applications and petitions filed herein by the Great Falls Gas Company, the General Services Administrator and Montana Consumers Association, et al, be, and the same are hereby denied, except as herein provided.

IT IS FURTHER ORDERED that a full, true and correct copy of this Order be sent forthwith by first-class United States mail to the applicant and all appearances in the above-entitled Docket.

The foregoing Order was unanimously adopted by the Public Service Commission of the State of Montana.

DONE in open session at Helena, Montana this 23rd day of February, 1962.

JACK HOLMES,
Chairman.

PAUL T. SMITH,
Commissioner.

LOUIS G. BOEDECKER,
Commissioner.

ATTEST:

CATHERINE DUBOIS,
Secretary

(Official Seal.)

REVISED CODES OF MONTANA, 1947

70-102. *Railroad commissioners as ex officio commission.* The board of railroad commissioners of the state of Montana shall be ex officio the public service commission hereby created, and for the purposes of this act shall be known and styled "Public Service Commission of Montana." It shall provide itself with a seal bearing these words, by which its official acts shall be authenticated in all cases where a seal is required; and in the name as above set forth, it may sue and be sued in the courts of the state and of the United States. The secretary of the railroad commission of Montana shall act as secretary of the commission hereby created, but the business of the public service commission shall be kept entirely separate from that of the railroad commission.

70-104. *Power to prescribe rules of procedure—judicial power.* In addition to the modes of procedure hereinafter prescribed in particular cases and classes of cases, said commission shall have power to prescribe rules of procedure, and to do all things necessary and convenient in the exercise of the powers by this act conferred upon the commission: provided, that nothing in this act shall be construed as vesting judicial powers on said commission, or as denying to any person, firm, association, corporation, municipality, county, town, or village the right to test, in a court of competent jurisdiction, the legality or reasonableness of any fixed order made by the commission in the exercise of its duties or powers.

70-106. *Power of commission to ascertain property values.* The Commission may, in its discretion, investigate and ascertain the value of the property of every public utility actually used and useful for the convenience of the public. In making such investigation the commission may avail itself of all information contained in the assessment rolls of various counties, and the public records of the various branches of the state government, or any other informa-

tion obtainable, and the commission may at any time of its own initiative make a revaluation of such property.

70-109. *Right to examine books, records, etc.* Any commissioner, or any person or persons authorized by the commission, shall have the right to examine the books, accounts, records, and papers of any public utility for the purposes of determining their correctness, and whether they are being kept in accordance with the rules and system prescribed by the commission.

70-116. *Rules as to inspections—public hearings.* The commission shall have the power to adopt reasonable and proper rules and regulations relative to all inspections, tests, audits, and investigations, and to adopt and publish reasonable and proper rules to govern its proceedings, and to regulate the mode and manner of all investigations and hearings of public utilities, and other parties before it. All hearings shall be open to the public.

70-117. *Inquiry into and investigation of management of all public utilities.* The commission shall have authority to inquire into the management of the business of all public utilities, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from any public utility all necessary information to enable the commission to perform its duties. The commission or any commissioner, or any person or persons employed by the commission for that purpose, shall, upon demand, have the right to inspect the books, accounts, papers, records, and memoranda of any public utility, and to examine, under oath, any officer, agent, or employee of such public utility in relation to its business and affairs.

Any person, other than one of said commissioners, who shall make such demand, shall produce his authority to make such inspection.

The commission may require, by order or subpoena, to be served on any public utility, in the same manner that a summons is served in a civil action in the district court,

the production, within this state, at such time and place as it may designate, of any books, accounts, papers, or records kept by such public utility in any office or place without the state of Montana, or verified copies in lieu thereof, if the commission shall so order, in order that an examination thereof may be made by the commission, or under its direction.

Any public utility failing or refusing to comply with any such order or subpoena, shall be subject to the liability named in section 70-110.

70-127. *Enforcement of rates or charges.* All rates, fares, charges, classifications, and joint rates fixed by the commission shall be enforced, and shall be prima-facie lawful, from the date of the order until changed or modified by the commission, or in pursuance of the next section. All regulations, practices, and service, prescribed by the commission, shall be enforced and action shall be brought for that purpose, pursuant to the provisions of the next section, or until changed or modified by the commission itself upon satisfactory showing made.

70-128. *Action to set aside rates or charges fixed by commission*

(1) Any party in interest being dissatisfied with an order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services may within ninety days commence an action in the district court of the proper county against the commission and other interested parties as defendants, to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order is unlawful or unreasonable, or that any such regulation, practice, or service, fixed in such order, is unlawful or unreasonable. The commission and other parties defendant shall file their answer to said complaint within thirty days after the service thereof, whereupon such action shall be at issue and stand ready for trial upon twenty days' notice to either party.

(2) All actions brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the court shall always be deemed open for the trial thereof, and the same shall be tried and determined as other civil actions; any party to such action may introduce evidence in addition to the transcript of the evidence offered to such commission. Any party in interest being dissatisfied with the order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing or prescribing any rule, regulation, practice, or service, may apply to the district court having jurisdiction, for, and upon proper showing there shall be issued by such court, an injunction, staying and suspending the operation of the order of the commission pending the final determination of the reasonableness and lawfulness of said order in the courts. All orders of the commission shall become operative within twenty days after the filing of the order by the commission subject to the right of stay and injunction as hereinbefore provided. As a condition to the granting of such injunction, the court shall require of the party seeking such injunction an undertaking entered into on the part of the plaintiff, supported by responsible corporate surety, in such reasonable sum as the court shall direct, to the effect that the plaintiff will pay all damages which the opposite party may sustain by reason of the delay or prevention of the order of the commission becoming effective if said order is sustained in the final determination, or in proceedings involving rates the court may in the alternative require the difference between the existing rate and the commission ordered rate to be impounded under the direction of the court, pending the final determination of the action.

(3) If, upon the trial of such action, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay

further proceedings in said action for fifteen days from the date of transmission. Upon receipt of such evidence, the commission shall consider the same, and may modify, amend, or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulation, practice, or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

(4) If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify, or amend the same, such altered, modified, or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

(5) Either party to said action, within sixty days after service of a copy of the order or judgment of the court, may appeal or take the case upon error as in other civil actions. Where an appeal is taken to the supreme court of Montana, the cause shall, on the return of the papers to the higher court, be immediately placed on the calendar of the then pending term, and shall be assigned and brought to a hearing in the same manner as other causes on the calendar.

(6) In all actions under this act, the burden of proof shall be upon the party attacking or resisting the order of the commission to show that the order is unlawful or unreasonable, as the case may be.